STATE OF WISCONSIN
IN THE
SUPREME COURT

Appeal No. 03-1067
LaFayette County Circuit Court Case No. 01-CV-048

ELAINE MARIE KOHN, RONNIE A. KOHN and
LORI K. KOHN,

Plaintiffs-Appellants,

PHYSICIANS PLUS INSURANCE CORPORATION,

Plaintiff,

v.

DARLINGTON COMMUNITY SCHOOLS,
EMC INSURANCE COMPANY,
STANDARD STEEL INDUSTRIES, INC., and
MEDALIST INDUSTRIES, INC.,

Defendants,

ILLINOIS TOOL WORKS INC.,

Defendant-Respondent-Petitioner.

BRIEF AND APPENDIX OF ILLINOIS TOOL WORKS INC.

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STATEMENT OF THE ISSUE

Are bleachers that have been erected and permanently anchored to their foundation at a football field for over 30 years an "improvement to real property" within the meaning of Wis. Stat. § 893.89(2), which provides a 10-year statute of repose for claims arising from improvements to real property?

Answered Below:

A. The trial court ruled that the bleachers were an improvement to real property under the statute and, therefore, the plaintiffs' claims against ITW—filed more than thirty years after the bleachers were installed—were untimely.

B. The Court of Appeals reversed the trial court, in a *per curiam* decision, ruling that the bleachers were not an improvement to real property because they lacked a sufficient "degree of physical annexation" to the property.

STATEMENT OF THE CASE

This is a personal injury case arising out of preschooler Elaine Kohn's fall through the bleachers at a high school football game on September 29, 2000. The claims at issue in this appeal—pursued by Elaine's parents on her behalf and their own—are against the alleged successor to the company that sold and erected the bleachers at the Darlington High School football field in 1969.

Purchase and Installation of the Bleachers

On June 18, 1969, defendant Darlington Community School District ("Darlington") entered into an agreement with Standard Steel Industries, Inc. ("Standard Steel") to supply materials and supervise the installation of aluminum bleachers at the Darlington High School's football field and track. Appendix ("App.") 051 and 067-070. Standard Steel agreed to ship the materials in August 1969, for which Darlington paid $16,167. App. 067. The bleachers were

erected in late August 1969, and they provide almost 1,500 seats to the Darlington football and track stadium. App. 067. The home stand bleachers, where the accident occurred, stand 15 rows tall and stretch more than 100 feet along the sidelines and in front of the press box. App. 067, 072, 076, 078, 083-084. The other part of the project was the visitors' bleachers—10 rows tall and 90 feet long. App. 067 and 085.

Maintenance of the Bleachers

Between the time the bleachers were installed and the accident giving rise to this lawsuit, Darlington's maintenance supervisor inspected them yearly and performed maintenance as necessary, including replacing walkway planks, side rails, and footboards. App. 051-052. Neither Standard Steel, Medalist nor ITW ever had any maintenance responsibilities for the bleachers. App. 029. In the course of Darlington's maintenance of the bleachers prior to Elaine Kohn's fall, they were never disassembled or moved. App. 051-053. Rather,

the bleachers have remained intact and in their present location since their 1969 installation. *Id.*

Elaine Kohn's Accident

On September 29, 2000, more than 31 years after the bleachers were completed, Lori Kohn and her daughter Elaine attended the Darlington Redbirds homecoming football game. App. 021, ¶ 13. The two of them sat on the bleachers. *Id.* At approximately 2:30 p.m., Elaine, then four-and-one-half years old, fell through the bleachers and sustained injuries. App. 021-022, ¶ 14. She has recovered fully from that fall.

Procedural Background

The Kohns commenced an action against Darlington and its insurer, EMC Insurance Company ("EMC"), on August 15, 2001, alleging Darlington breached its duty of care to plaintiffs Lori Kohn and Elaine Kohn as frequenters of the premises Darlington owned and maintained. *See* R. 1, pp. 4-5.

The Kohns commenced this action against Standard Steel, Medalist, and ITW[1] by filing their April 15, 2002 amended complaint claiming the bleachers were defective in construction, design and installation. App. 015-026.

On July 25, 2002, ITW filed an amended answer and raised the statute of limitations in Wis. Stat. § 893.89 as an affirmative defense. App. 027-034. Eight days later, ITW filed a motion for summary judgment seeking dismissal of all claims against it based on § 893.89. App. 035-045; *see also* R. 40. In response to ITW's motion, plaintiffs argued that Wis. Stat. § 893.89 did not apply because this is a products liability case or, alternatively, that the statute is unconstitutional. R. 41, 46, 51 and 52. Plaintiffs did not even

[1] Standard Steel's assets were acquired by Medalist Industries, Inc. ("Medalist") in 1975. App. 020; *see also* R. 30, p. 2, ¶ 11; App. 029, ¶ 11. A second asset acquisition occurred on December 31, 1997, when Medalist was acquired by ITW. App. 021 and 029. ITW disputes any successor liability for claims related to the bleachers, but that issue was not decided by either lower court.

argue that the bleachers were not an improvement to real property. *Id.*

The trial court, the Honorable William F. Eich, Reserve Judge, presiding, held a hearing on ITW's summary judgment motion on August 28, 2002. *See* R. 44 and R. 56. Shortly after requesting additional briefing, *see* R. 55, Judge Eich recused himself from the case and Reserve Judge Daniel L. Larocque ("Judge Larocque") was assigned. R. 58, R. 64 and R. 65.

On January 18, 2003, Judge Larocque issued a Decision granting ITW's motion in its entirety. App. 006-009. An Order dismissing all claims against ITW with prejudice was entered on February 3, 2003. R. 71. On April 15, 2003, the Kohns filed a timely Notice of Appeal with the Wisconsin Court of Appeals, District IV. In their briefs to the Court of Appeals, the Kohns asserted for the first time that

the bleachers were not an improvement to real property for purposes of Wis. Stat. § 893.89.

On July 1, 2004, the Court of Appeals reversed and remanded the case in a *per curiam* decision that found the bleachers were not an improvement to real property. App. 001-005. ITW moved for reconsideration pursuant to Wis. Stat. § 809.24 on July 20, 2004. App. 010-014. ITW's motion for reconsideration was denied on August 9, 2004.

STATUTE AT ISSUE

Chapter 893 of the Wisconsin Statutes includes a ten-year limitations period for actions arising out of improvements to real property. The statute states:

893.89. Action for injury resulting from improvements to real property

> (1) In this section, "exposure period" means the 10 years immediately following the date of substantial completion of the improvement to real property.
>
> (2) Except as provided in sub. (3), no cause of action may accrue and no action may be commenced, including an action for contribution or indemnity, against the owner or occupier of the property or against any person involved in the improvement to real property after the end of the exposure period, to recover damages for any injury to property, for any injury to the person, or for wrongful death, arising out of any deficiency or defect in the design, land surveying, planning, supervision or observation of construction of, the construction of, or the furnishing of materials for, the improvement to real property. This subsection does not affect the rights of any person injured as the result of any defect in any material used in an improvement to real property to commence an action for damages against the manufacturer or producer of the material.
>
> (3)(a) Except as provided in pars. (b) and (c), if a person sustains damages as the result of a deficiency or defect in an improvement to real property, and the statute of limitations applicable to the damages bars commencement of the cause of action before the end of

the exposure period, the statute of limitations applicable to the damages applies.

(b) If, as the result of a deficiency or defect in an improvement to real property, a person sustains damages during the period beginning on the first day of the 8th year and ending on the last day of the 10th year after the substantial completion of the improvement to real property, the time for commencing the action for the damages is extended for 3 years after the date on which the damages occurred.

(c) An action for contribution is not barred due to the accrual of the cause of action for contribution beyond the end of the exposure period if the underlying action that the contribution action is based on is extended under par. (b).

(4) This section does not apply to any of the following:

(a) A person who commits fraud, concealment or misrepresentation related to a deficiency or defect in the improvement to real property.

(b) A person who expressly warrants or guarantees the improvement to real property, for the period of that warranty or guarantee.

(c) An owner or occupier of real property for damages resulting from negligence in the maintenance, operation or inspection of an improvement to real property.

(d) Damages that were sustained before April 29, 1994.

(5) Except as provided in sub. (4), this section applies to improvements to real property substantially completed before, on or after April 29, 1994.

(6) This section does not affect the rights of any person under ch. 102.

SUMMARY OF THE ARGUMENT

The bleachers, which stood static for more than 30 years between their installation and Elaine Kohn's accident, are unquestionably an improvement to real property. To conclude otherwise, as the Court of Appeals did, would lead to the absurd result of withdrawing the protection of § 893.89 from almost every improvement to real property—a result plainly in conflict with the legislature's intent.

Whether the bleachers are an "improvement to real property" under Wis. Stat. § 893.89 is a question of law. *See Kallas Millwork Corp. v. Square D Co.*, 66 Wis. 2d 382, 225 N.W.2d 454 (1975). This is the first opportunity for this Court to interpret Wis. Stat. § 893.89(2) and its statute of repose for improvements to real property since the statute was amended in 1993.

This Court has twice explained the criteria for lower courts to determine whether a structure is an improvement to

real property, *see U.S. Fire Ins. Co. v. E.D. Wesley Co.*, 105 Wis. 2d 305, 313 N.W.2d 833 (1982); *Kallas*, 66 Wis. 2d 382, basing the determination of what is an "improvement to real property" on the common usage of the term.

In this case, the Court of Appeals ignored the uncontroverted evidence that the bleachers satisfied the standard set forth in *Kallas* and *Wesley* and, instead, relying on *Massie v. City of Duluth*, 425 N.W.2d 858 (Minn. Ct. App. 1988), its own recent decision in a tax case, *All City Communication Co., Inc. v. DOR*, 2003 WI App 77, 263 Wis. 2d 394, 661 N.W.2d 845, and a "degree of physical annexation" standard, reversed the circuit court's decision. In fact, this case is the first time *any* Wisconsin appellate court has applied a "degree of physical annexation" analysis to § 893.89 (or its predecessor statutes). The Court of Appeals' decision is both contrary to the evidence and inconsistent with

this Court's precedent. The Court of Appeals must be reversed and the trial court affirmed.

ARGUMENT

The legislature enacted Wis. Stat. § 893.89 to provide a sunset on liability for parties involved in "the design, land surveying, planning, supervision or observation of the construction of, or the furnishing of materials for" improvements to real property. Wis. Stat. § 893.89(2). The statute's protection is, however, limited—it does not extend to manufacturers and producers of defective materials or for owners and occupiers charged with maintenance and upkeep of improvements. *See* Wis. Stat. § 893.89(2)-(4).

The legislature's intended coverage for this statute of repose stops with the improvement itself, that is, parties who provided labor or materials and nothing further after substantial completion. The logic is clear—at some point after substantial completion the contribution of these actors is

conclusively superceded by time, the elements, and the care, repairs, and maintenance of third parties. Other statutes of repose in the Wisconsin Statutes reflect similar public policy decisions by the legislature. *See* Wis. Stat. §§ 893.55 and 893.56 (medical malpractice); Wis. Stat. § 893.37 (surveyors).

This Court has based its determinations of what is an "improvement to real property" on the common usage of the term. *See Wesley*; *Kallas*. The dictionary definition employed by this Court states that an improvement is:

> [A] permanent addition to or betterment of real property that enhances its capital value and that involves the expenditure of labor or money and is designed to make the property more useful or valuable as distinguished from ordinary repairs.

Kallas, 66 Wis. 2d at 386, *citing* WEBSTER'S THIRD INTERNATIONAL DICTIONARY, 1965. Noting that the determination of what constitutes an "improvement" is a question of law and not of fact and applying this definition,

this Court concluded that a high-pressure water system designed for fire protection constituted "an improvement to real property" within the meaning of the predecessor to Wis. Stat. § 893.89, as a matter of law. *Id.*

In *Wesley*, this Court similarly held that an underground oil pipeline connected to equipment located on the defendant's property was an "improvement to real property." 105 Wis. 2d at 309. Relying on the same definition of "improvement" it used in *Kallas*, this Court held "as a matter of law that when the pipeline was connected to the equipment located on the [defendant's] real property, that pipeline became an improvement to the [defendant's] real property." *Id.*

Based on the uncontroverted evidence submitted by ITW with its summary judgment motion, Judge Larocque decided, as a matter of law, that the bleachers were an improvement to real property. App. 006-009.

In this case, the Court of Appeals ignored the uncontroverted evidence that the bleachers satisfied the standard set forth in *Kallas* and *Wesley* and, relying on the Minnesota Court of Appeals' decision in *Massie*, its own recent decision in a tax case and a new "degree of physical annexation" test, reversed the circuit court's decision. This was error.

A. The Bleachers Were An Improvement To Real Property.

In order to be an improvement to real property under Wis. Stat. § 893.89, the bleachers must have: been a permanent addition to or betterment of the property; enhanced the property's capital value; involved the expenditure of money or labor; and been designed to make the property more useful. *See Kallas*, 66 Wis. 2d at 386. They were. Indeed, what else could permanent bleachers at an athletic field be? Their permanency is a function of their purpose, a purpose

that both adds value to the property and makes it more useful, benefits that could only be obtained at considerable cost. Presumably, if Darlington had put a water or oil tank on the same structure, there could be no question that it would be an improvement to real property. That, instead of water or oil, the bleachers hold students, parents and fans, is not a meaningful distinction at all.

With its motion for summary judgment, ITW put the following evidence in the record:

- In 1969, Darlington received and accepted a bid from Standard Steel for bleachers specific to the new Darlington athletic field, at a cost of $16,167.00. App. 051, 067-070.
- The bleachers created seating for nearly 1,500 spectators and, on the home side where the Kohns sat, stand 15 rows tall and run more than 100 feet along the sidelines. App. 067, 072, 076, 078, 083-084.
- After the bleachers were installed, Darlington's maintenance supervisor inspected the bleachers yearly and performed maintenance as necessary, including: replacing walkway planks, side rails, and footboards. App. 051-052.

- During the 31 years between the completion of the bleachers and Elaine Kohn's fall, the bleachers were never disassembled or moved. App. 051-053.
- Numerous photographs of the bleachers show that the bleachers are permanently erected on a steel frame and anchored to their foundation. App. 072-085.

The Kohns did not contradict any of this evidence. In fact, they put in no evidence at all relating to the nature of the bleachers. *Id.*

The Court of Appeals ignored much of the evidence and misapplied, to the extent it used it at all, the *Kallas* test. Specifically, in its analysis, the Court of Appeals discussed the "extensive excavation" that would be required to *move* the pipes in the *Kallas* and *Wesley* cases. App. 004-005, ¶ 7.[2] However, the effort required to move (or remove) a purported improvement to real property is not the test—this Court has

[2] The Court of Appeals stated that, in both *Kallas* and *Wesley,* the "pipes could not be moved absent extensive excavation." App. 004-005, ¶ 7. There is no indication in the *Kallas* decision that the pipes were underground (it is highly unlikely that they were—they were for fire protection in buildings) or that they would require "extensive excavation" to move or remove.

clearly stated that the analysis involves the effort and expenditure undertaken to *install* the improvement. *See Kallas*, 66 Wis. 2d at 386.

This case is not unique; bleachers have been held to constitute an improvement to real property for the purpose of applying statutes of repose in other states. *See, e.g., Florence County School Dist. No. 2 v. Interkal Inc.*, 559 S.E.2d 866 (S.C. Ct. App. 2002) (statute of repose for actions involving defective or unsafe conditions of improvements to real property applied to and barred action for contribution against manufacturer of bleachers that collapsed after statute of repose had run); *McDonough v. Marr Scaffolding Co.*, 591 N.E.2d 1079 (Mass. 1992) (statute of repose protected installer of bleachers at town skating rink through which child fell).

The Court of Appeals' decision implies that *any* improvement that may be disassembled or removed cannot, as

a matter of law, be an improvement to real property. If that is the standard, nothing short of poured concrete will fall within Wis. Stat., § 893.89, because *any* other improvement *can* be moved or removed.

Many other courts also have disagreed with the Court of Appeals, and held that a removable structure may constitute an "improvement to real property" for purposes of a statute of repose if it is intended to enhance the use to which the property is dedicated. *See, e.g., McDonough*, 591 N.E.2d at 1081 (bleachers do not have to be permanently affixed to the real property in order to be considered "an improvement to real property" within the meaning of the statute of repose; it was sufficient that the bleachers enhanced the usefulness of the skating rink on the real property); *Snow v. Harnischfeger Corp.*, 823 F. Supp. 22 (D. Mass. 1993), *aff'd*, 12 F.3d 1154 (1st Cir. 1994) ("of course, that an item can be removed or replaced hardly means it cannot constitute an improvement");

Robinson v. Chin & Hensolt, 120 Cal. Rptr. 2d 49 (App. Ct. 2002) (simply because a cable car turntable can be torn out does not make it any less of an improvement to real property); *Jarnagin v. Fisher Controls Int'l Inc.*, 573 N.W.2d 34 (Iowa 1997) (permanence is not an absolute requirement to constitute an improvement where a gas regulator was designed to make the property more useful or valuable); *Pendzsu v. Beazer East Inc.*, 557 N.W.2d 127 (Mich. Ct. App. 1996) (test for "improvement to real property" as used in statute of repose is not whether it can be removed without damage to the land but whether it adds to the value of the realty for the purposes for which it was intended to be used); *Hayslett v. Harnischfeger Corp.*, 815 F. Supp. 1294 (W.D. Mo. 1993) (improvement includes things built or placed upon land rendering it more fit for use); *Dedmon v. Stewart-Warner Corp.*, 950 F.2d 244 (5th Cir. 1992) (an "improvement" can be anything that permanently enhances

the value of the premises, and may even be something easily removable so long as it is attached and intended to remain permanently as part of the building).

Not only is the Court of Appeals' conclusion counterintuitive, it vastly contracts the intended scope of § 893.89 and leads to a perverse and absurd result—one that must be avoided under well-settled maxims of statutory construction.

B. *Massie* Is Neither Binding Nor Supportive Of The Court Of Appeals' Decision.

The Court of Appeals also relied on the Minnesota Court of Appeals' decision in *Massie* claiming that "the water slide in *Massie* presents the closest analogy." App. 004. In fact, the only analogy between *Massie* and this case is that, like the water slide (and, for that matter, *any* structure with a foundation), the bleachers are attached to their foundation. However, the water slide was installed so that it could be

removed and stored each fall. 425 N.W.2d at 859. And, in fact, that is exactly what was done each year from 1975 through 1983. *Id.* The *Massie* court found that the water slide was not a "permanent addition to the property" because "it was designed to be and was removed every winter for storage." *Id.* at 861.

Here, in stark contrast to *Massie*, it is undisputed that the bleachers were *never* disassembled, moved or removed during the 31 years between their installation and Elaine Kohn's accident. Nor is there any evidence that they were intended to be moved, ever. And, while almost any assembly of materials can be disassembled, the photographs of the bleachers clearly show (consistent with their three decades of continuous use) that their attachment to the foundation is intended to be permanent and not seasonal. App. 072-085.

C. The Court of Appeals' Reliance On *All City* Was Both Misplaced And Errant.

The Court of Appeals also claims that its "holding is in accord with a recent decision [it] made, albeit regarding a tax statute, that a communications tower was not an improvement to real property because it could be disassembled and moved." App. 004-005, *citing All City*, 2003 WI App 77, ¶ 7. Other than the Court of Appeals' decisions—on two entirely different legal issues—that neither case involved, respectively, an "improvement to real property" (under § 893.89) or a "real property improvement," (for tax assessment purposes), nothing between *All City* and this case is "in accord."

All City involved a communications tower installed by two communications companies on leased land. 2003 WI App 77, ¶ 2. Here, the bleachers were installed by Standard Steel on Darlington's property.

In *All City*, the companies retained ownership of the tower and the right to remove it at the end of the lease term. *Id.* In this case, Standard Steel sold the bleachers (and its labor for their installation) to Darlington; no ownership was retained.

The legal issue in *All City* was whether the tower was personal property, which is taxable, or real property (a fixture) which would not fall under Wisconsin's sales and use tax. That is a very different issue than whether bleachers are an improvement to real property entitling the company that sold and installed them to the protection of a statute of repose.

In *All City,* the Wisconsin Department of Revenue ("DOR") considered the tower personal property and assessed sales and use tax on it. *Id.*, ¶ 4. Tax Commission proceedings resulted in findings that the tower was specifically designed for the leased land, that the tower could be disassembled and either reassembled elsewhere or sold for

scrap, and that there was a market for the sale of used towers. *Id.*, ¶ 5. Treating those findings as undisputed facts, the Court of Appeals applied them to Chapter 77 of the Wisconsin statutes to decide whether the tower was "personal property" or "real estate." *Id.*, ¶ 13. Engaging in the familiar analysis of *Wisconsin Dep't of Revenue v. A.O. Smith Harvestore Prods., Inc.*, 72 Wis. 2d 60, 240 N.W.2d 357 (1976), to determine if personal property is actually a "fixture" (*i.e.,* real estate, and not subject to sales and use tax), the Court of Appeals agreed with the Commission that the tower was taxable personal property. *All City*, 2003 WI App 77, ¶ 26.

The question of law in this case and the one answered in *All City* are so fundamentally different that this Court has never treated them alike.

Not once, in its several interpretations of § 893.89 (and its predecessors) has this Court employed the fixture analysis to determine whether a structure was an "improvement to real

property" and subject to the statute of repose. Ironically, the Court of Appeals even ignored its own warning in *All City*, where it stated: "We will not, however, rely on all the [*Harvestore* analysis] decisions cited by the parties. While many decisions distinguish real estate from personal property, they do so in various contexts. *Borrowing language from one context and applying it to another poses a danger.*" *Id.*, ¶ 16 (emphasis added). Precisely.

Even more ironically, however, if properly applied, the bleachers in this case *would* satisfy the test: They are actually physically annexed to the real estate; they are specifically adapted to the purpose to which the real estate—the football field and track—is devoted; and Darlington's intent to make them a permanent part of the stadium is obvious. *See Harvestore*, 72 Wis. 2d at 67-68.[3] Therefore, even if the

[3] This seminal case in Wisconsin clearly establishes that even a prefabricated and ultimately removable structure may constitute a fixture. *See Harvestore* (even though silo could be taken down piece by

analysis for an improvement to real property under Wis. Stat. § 893.89 was the same as the analysis for a fixture (which it isn't), the bleachers would satisfy the test. And, although an improvement to real property need not be a fixture, by definition a fixture *is* an improvement to real property. 35A Am. Jur. 2d Fixtures § 2 (2001).

Ultimately, like the water slide in *Massie*, the only analogy between the *All City* tower and Darlington's bleachers is the fact that they are erected on and attached to a foundation, which can be said of almost any improvement to real property. The bleachers were not built on leased property, neither Standard Steel nor Medalist nor ITW had any right to remove them, and there is no evidence of any "resale" market for them. To the contrary, the only evidence

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piece and reconstructed in the same way, it constituted a fixture where it was bolted to the foundation, was adapted to the use to which the realty was devoted, and was presumably intended to be made a permanent accession to the property).

of the character of the bleachers was submitted by ITW and it establishes the bleachers' permanency.

D. Unless Overturned, The Court Of Appeals' Decision Would Place Almost Everything Commonly Understood To Be An Improvement Beyond The Statute's Scope.

If the bleachers at the Darlington High School football stadium are not an "improvement to real property" under Wis. Stat. § 893.89, then what is? The Court of Appeals would, presumably, find nothing short of poured concrete within the statute's parameters. That is simply incorrect. A structure, like the bleachers, in place and unaltered for over thirty years, anchored to the ground and built solely to enhance the use of the field on which it sits, must be an improvement to real property.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

Dated: December 15, 2004

LA FOLLETTE GODFREY & KAHN

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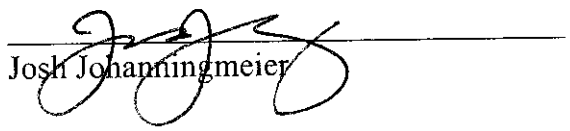
CERTIFICATION

I hereby certify that this brief conforms to the requirements of Wis. Stat. §§ 809.19(8)(b) and (c), and this Court's November 17, 2004 Order for a brief produced with a proportional font. The length of this brief is 4,345 words.

Dated: December 15, 2004.



Josh Johanningmeier

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COURT OF APPEALS
DECISION
DATED AND FILED

July 1, 2004

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 03-1067 Cir. Ct. No. 01CV000048

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

ELAINE MARIE KOHN, RONNIE A. KOHN AND LORI K. KOHN,

PLAINTIFFS-APPELLANTS,

PHYSICIANS PLUS INSURANCE CORPORATION,

PLAINTIFF,

V.

DARLINGTON COMMUNITY SCHOOLS, EMC INSURANCE COMPANY, STANDARD STEEL INDUSTRIES, INC., AND MEDALIST INDUSTRIES, INC.,

DEFENDANTS,

ILLINOIS TOOL WORKS, INC.,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Lafayette County: DANIEL L. LaROCQUE, Judge. *Reversed and cause remanded with directions.*

Before Dykman, Lundsten and Higginbotham, JJ.

¶1 PER CURIAM. Elaine, Ronnie and Lori Kohn appeal from the circuit court's judgment dismissing this case. The issue is whether aluminum bleachers are an "improvement to real property" within the meaning of WIS. STAT. § 893.89(2) (2001-02).[1] We conclude that they are not. Therefore, we reverse and remand for further proceedings.

¶2 Lori Kohn and her four-year-old daughter, Elaine, attended a football game at a public high school. Elaine fell through an opening in the metal bleachers, sustaining a severe head injury. The Kohns commenced a lawsuit against the school district, its insurer, and Illinois Tool Works, Inc., the successor corporation to the company that constructed and installed the bleachers.[2]

¶3 Illinois Tool Works moved for summary judgment arguing that the suit against it was barred by WIS. STAT. § 893.89(2). This statute prohibits actions from being brought against the owner or occupier of real property, or against any person involved in the improvement to real property, more than ten years immediately following the date of substantial completion of the improvement to real property.[3] The circuit court concluded that the bleachers were an

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[1] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

[2] The predecessor corporations were also named as defendants, but they no longer exist.

[3] WISCONSIN STAT. § 893.89 provides:

> (1) In this section, "exposure period" means the 10 years immediately following the date of substantial completion of the improvement to real property.

(continued)

improvement to real property to which the ten-year limitation period applied. Because Elaine was injured almost thirty-one years after the bleachers were installed, the circuit court dismissed the case.

¶4 Whether the bleachers are an improvement to real property under the statute is a question of law because it requires the court to decide whether undisputed facts fall within the scope of the statute. *See* ***Kallas Millwork Corp. v. Square D Co.***, 66 Wis. 2d 382, 386, 225 N.W.2d 454 (1975). Two supreme court cases provide guidance. In ***Kallas***, the supreme court decided that a high-pressure water pipe was an improvement to real property under a predecessor statute. ***Id.*** The court relied on the dictionary definition of "improvement," which is "a permanent addition to or betterment of real property that enhances its capital value and that involves the expenditure of labor or money and is designed to make the property more useful or valuable as distinguished from ordinary repairs." ***Id.*** In ***U.S. Fire Ins. Co. v. E.D. Wesley Co.***, 105 Wis. 2d 305, 313 N.W.2d 833 (1982), the supreme court held that an underground oil pipe was an improvement to real property, again relying on the common usage of the word "improvement." ***Id.***, 105 Wis. 2d at 309.

> (2) Except as provided in sub. (3), no cause of action may accrue and no action may be commenced, including an action for contribution or indemnity, against the owner or occupier of the property or against any person involved in the improvement to real property after the end of the exposure period, to recover damages for any injury to property, for any injury to the person, or for wrongful death, arising out of any deficiency or defect in the design, land surveying, planning, supervision or observation of construction of, the construction of, or the furnishing of materials for, the improvement to real property. This subsection does not affect the rights of any person injured as the result of any defect in any material used in an improvement to real property to commence an action for damages against the manufacturer or producer of the material.

¶5 The Kohns argue that the bleachers are not an improvement to real property because they rest on top of the ground, did not require excavation to be installed, did not change the basic nature of the land upon which they sit, and may be taken apart and moved, in contrast to the underground gas and water pipelines in ***Kallas*** and ***U.S. Fire***. The Kohns contend the bleachers are analogous to the water slide discussed in ***Massie v. City of Duluth***, 425 N.W.2d 858, 861 (Minn. Ct. App. 1988), where the Minnesota Court of Appeals decided a water slide was not an improvement to real property. The court reasoned that, while the slide was bolted in concrete at the bottom of a pond, it was designed to be and was removed every winter for storage. ***Id.***

¶6 Illinois Tool argues that the bleachers *are* an improvement to real property because they are a permanent fixture at the football field. Illinois Tool points out that the bleachers have never been disassembled or moved in thirty-one years and, relying on photographs of the bleachers, contends that they are permanently erected on a steel frame and anchored in asphalt.

¶7 Illinois Tool, however, points to no place in the record describing how the bleachers are supposedly "anchored" to the ground. Our review of the photographs supports the plaintiffs' view that the bleachers rest on the ground. The degree of physical annexation shown by the pictures convinces us that the bleachers are not an improvement to real property. The pipelines in ***Kallas*** and ***U.S. Fire*** had a higher degree of physical annexation than the bleachers because the pipes could not be moved absent extensive excavation. The water slide in ***Massie*** presents the closest analogy and, while that case is not binding on us, it persuades us that the bleachers do not fall within the ambit of the statute. We note, too, our holding is in accord with a recent decision we made, albeit regarding a tax statute, that a communications tower was not an improvement to real

property because it could be disassembled and moved. *See* ***All City Communication Co., Inc. v. DOR***, 2003 WI App 77, ¶25, 263 Wis. 2d 394, 661 N.W.2d 845.

¶8 In sum, we conclude that WIS. STAT. § 893.89(2) does not bar this action. This case is therefore governed by the three-year statute of limitations applicable to personal injury cases, *see* WIS. STAT. § 893.54, and was timely filed. We reverse the circuit court's order dismissing Illinois Tool Works and remand for further proceedings consistent with this opinion.

By the Court.—Judgment reversed and cause remanded with directions.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)5.

COPY

STATE OF WISCONSIN CIRCUIT COURT LAFAYETTE COUNTY

ELAINE MARIE KOHN et al,

Plaintiffs,

v.

DARLINGTON COMMUNITY SCHOOLS,

ILLINOIS TOOL WORKS, INC., et al,

Defendants.

Case No. 01 CV 048

DECISION

One of the defendants in this tort action, Illinois Tool Works, Inc., (ITW), seeks summary judgment on grounds that the plaintiffs claims are time barred by the ten year limitation of sec. 893.89, Stats., entitled *Action for injury resulting from improvements to real property.*[1] The claims arise from an injury to a four year old child in the year 2000

[1] **893.89** ***Action for injury resulting from improvements to real property***

(1) In this section, "exposure period" means the 10 years immediately following the date of substantial completion of the improvement to real property.

(2) Except as provided in sub. (3), no cause of action may accrue and no action may be commenced, including an action for contribution or indemnity, against the owner or occupier of the property or against any person involved in the improvement to real property after the end of the exposure period, to recover damages for any injury to property, for any injury to the person, or for wrongful death, arising out of any deficiency or defect in the design, land surveying, planning, supervision or observation of construction of, the construction of, or the furnishing of materials for the improvement to real property. This subsection does not affect the rights of any person injured as the result of any defect in any material used in an improvement to real property to commence an action for damages against the manufacturer or producer of the material.

(3) (a) Except as provided in pars. (b) and (c), if a person sustains damages as the result of a deficiency or defect in an improvement to real property, and the statute of limitations applicable to the damages bars commencement of the cause of action before the end of the exposure period, the statute of limitations applicable to the damages applies.

(b) If, as the result of a deficiency or defect in an improvement to real property, a person sustains damages during the period beginning on the first day of the 8th year and ending on the last day of the 10th year after the substantial completion of the improvement to real property the time for commencing the action for damages is extended for 3 years after the date on which the damages occurred.

(c) An action for contribution is not barred due to the accrual of the cause of action for contribution beyond the end of the exposure period if the underlying action that the contribution action is based on is extended under par. (b).

(4) This section does not apply to any of the following:

(a) A person who commits fraud, concealment or misrepresentatioin related to a deficiency or defect in the improvement to real property.

(b) A person who expressly warrants or guarantees the improvement to real property, for the period of the warranty or guarantee.

(c) An owner or occupier of real property for damages resulting from negligence in the maintenance, operation or inspection of an improvement to real property.

when she fell through bleachers installed in 1969 by ITW's predecessor corporation at the Darlington High School football field. ITW's motion is granted.

Plaintiffs first contend that because their claim against ITW "arise out of and are governed by the law of products liability," the aforementioned statute does not apply. Alternatively, plaintiffs say that if the statute is applicable, it is unconstitutional under the Equal Protection provisions of the the state and federal constitutions, and violates Article 1, Section 9 of the Wisconsin Constitution as well.[2]

The bleachers are an improvement to real property as a matter of law. See e.g. *Kallas Millwork Corporation v. Square D Co., 66 Wis. 386 at 385-386 (1975).* Contrary to plaintiffs argument, sec. 893.89, Stats., applies to their claim to recover damages for an injury arising out of the improvement to real property.

The real issue is the constitutionality of the statute.[3] The challenger must prove beyond a reasonable doubt that the statute is unconstitutional. *Chappy v. LIRC, 136 Wis. 2d 172 (1987).* Two former versions of the statute have been declared unconstitutional on equal protection grounds by our Supreme Court: sec. 893.155, Stats., (1965), in *Kallas,* and an amended statute, sec. 893.89, Stats., (1975), in *Funk v. Wollin Silo & Equipment, Inc. 148 Wis.2d 59 (1989).*

In *Kallas*, the plaintiff sued a neighboring property owner as well as the installer of a high-pressure water line for damages suffered when the pipe burst in 1968. The defendant installer sought dismissal under a six year statute of limitations because the pipe was installed at least 15 years earlier. *Kallas* held the statute in question barring

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(d) Damages that were sustained before April 29, 1994.

(5) Except as provided in Sub. (4), this section applies to imrpovements to real property substantially completed before, on or after April 29, 1994.

(6) This section does not affect the rights of any person under ch. 102.

[2]Section 1, Article XIV of the amendments to the United States Constitution provides in part: "...No State...shall deny to any person within its jurdiction the equal protection of the laws." Article I, Section 1 of the Wisconsin Constitution provides in part: "All people are born equally free and independent and have certain inherent rights." Article I, Section 9 of the Wisconsin Constitution provides: "Every person is entitled to a certain remedy in the law for all injuries, or wrongs which he may receive in his person, property or character; he ought to obtain justice freely, and without being obliged to purchase it, completely without denial, promptly and without delay, conformably to the laws."

[3] ITW questions the timliness of plaintiff's equal protection argument raised after initial briefing and oral argument was over. Judge Eich then requested additional briefing only on the question whether Article 1, Section 9 of the Wisconsin Constitution invalidated the statute. Both parties, however, briefed the equal protection argument and the court will therefore address it.

claims after six years "against any person performing or furnishing the design, planning, supervision of construction or construction" of improvement to real estate was unconstitutional. Citing cases from other jurisdictions, *Kallas* noted that under the statutory scheme, the owners were burdened for their negligence (reasonable care toward the safety of other persons) while the contractor escapes liability. This result, the court decided, arbitrarily protected a restricted class for no reasonable purpose or with no justifiable public policy to support it

Funk decided that the legislature's 1975 attempt to fix the statute failed. In that case, plaintiffs alleged damages occuring in 1984 against the defendant for allegedly negligently constructing a silo in 1977.[4] The 1975 version of the statute merely added surveyors and material suppliers to the protected class, but did not protect owners and occupants of land, and the court applied the *Kallas* rationale to rule it unconstitutional.

The plaintiffs here argue that the current statute continues to irrationally excludes a class of persons from protection, namely manufacturers or producers of defective material used in an improvement to real property.

Wisconsin uses a five-part test to determine if a rational basis exists for a legislative classification. See *e.g. Dane County v. McManus 55 Wis.2d 413 (1972):*

(1) All classification(s) must be based upon substantial distinctions which make one class really different from another;

(2) The classification adopted must be germane to the purpose of the law.

(3) The classification must not be based upon existing circumstances only.

(4) To whatever class a law may apply, it must apply equally to each member thereof; and

(5) The characteristics of each class should be so far different from those of other classes as to reasonably suggest at least the propriety, having regard to the public good, of substantially different legislation.

This court concludes that the legislature could reasonably decide that manufacturers of defective materials constitutes a distinct class from persons involved

[4] The *Funk* court held that the plaintiffs had standing to challenge the constitutionality of the statute on equal protection grounds. The plaintiffs were injured in the economic sense and had a personal stake in the outcome of the case and *Funk* overruled a contrary conclusion by the court of appeals in *Hartland-Richmond Town Ins. Co. v. Wudtke, 145 Wis.2d 496 (Ct. App. 1988).*

directly in an improvement to real property. At least, this distinction is not unreasonable and irrational beyond a reasonable doubt. Those manufacturers left left unprotected by the statute may be only fortuitously connected to improvement to real property.

Finally, plaintiffs argue that the statute violates Article I, section 9 of the Wisconsin Constitution. Plaintiffs equitable argument that it is fundmentally unfair to exclude a claim by statute before the claim even arises has been dealt with in recent decisions including *Aicher v. Wisconsin Compensation Fund 2000 WI 98, 237 Wis.2d 99 (2000). Aicher v. Wisconsin Patients Compensation Fund, 2000 WI 98, 237 Wis.2d 122 (2000)* and *Landis v. Physicians Insurance Co. of Wis. Inc., 2001 WI 86, 245 Wis. 2d 1 (2001)* are the latest discussions of this provision. The plaintiff would distinguish the holding in *Aicher* because this statute does not bar lawsuits against manufacturers altogether. This is esentially the equal protection argument restated and fails for the same reason previously stated. ITW should prepare an order granting its motion for summary judgment.

Dated this 16 day of January, 2003.

DLL

Daniel L. LaRocque Reserve Judge Lafayette County, Wisconsin

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

No. 03-1067

ELAINE MARIE KOHN,
RONNIE A. KOHN, and
LORI K. KOHN,

Plaintiffs-Appellants,

PHYSICIANS PLUS INSURANCE CORPORATION,

Plaintiff,

v.

DARLINGTON COMMUNITY SCHOOLS,
EMC INSURANCE COMPANY,
STANDARD STEEL INDUSTRIES, INC., and
MEDALIST INDUSTRIES, INC.,

Defendants,

ILLINOIS TOOL WORKS INC.,

Defendant-Respondent.

Appeal From An Order Of The Lafayette County Circuit Court,
Hon. Daniel L. Larocque, Presiding
Circuit Court Case No. 01-CV-48

ILLINOIS TOOL WORKS INC.'S MOTION FOR RECONSIDERATION

Defendant-Respondent Illinois Tool Works Inc. ("ITW") moves the Court pursuant to Wis. Stats. § 809.24 for reconsideration of its July 1, 2004, *per curiam* decision on two grounds.

First, the Court based its decision, in large part, on the perceived absence of evidence in the record that the bleachers at issue are attached to the asphalt foundation upon which they were built. *Elaine Marie Kohn et al. v. Darlington Community Schools et al.*, No. 03-1067 (Wis. Ct.

App. July 1, 2004), slip op. at 7. There is, in fact, evidence in the record to show the bleachers are attached to the asphalt foundation and that their physical annexation to the property is as substantial as the pipelines in the *Kallas Millwork Corp. v. Square D Co.*, 66 Wis. 2d 382, 225 N.W.2d 454 (1975) and *U.S. Fire Ins. Co. v. E.D. Wesley Co.*, 105 Wis. 2d 305, 313 N.W.2d 833 (1982) cases. If the Court finds the record evidence is incomplete, ITW requests that the decision be modified to require additional fact finding by the trial court on the question of the degree of physical annexation.

The second ground upon which ITW brings its motion for reconsideration is a point of law not addressed by the Court of Appeals. Plaintiffs, in the trial court, failed to contest ITW's argument that the bleachers were an improvement to real property pursuant to Wis. Stats. § 893.89(2). Plaintiffs waived any argument, in this Court, that the bleachers were not an improvement to real property subject to the 10 year statute of repose.

I. THE BLEACHERS ARE ANCHORED TO THE GROUND AND ARE AN IMPROVEMENT TO REAL PROPERTY.

The Court stated in its decision that ITW "points to no place in the record describing how the bleachers are supposedly 'anchored' to the ground." *Kohn,* slip op. at 7. ITW did, however, point to specific evidence of the bleachers' permanency and attachment. *See* Brief of Defendant-Respondent Illinois Tool Works Inc. ("ITW Br.") at 14.

A. <u>There Is Evidence In The Record Demonstrating That The Bleachers Are Anchored To The Foundation</u>.

Photographs in the record show the hardware attaching the bleachers to the foundation. ITW referred the Court to the photographic evidence on page 14 of its brief.[1] Specific

[1] ITW's brief included at page 14, among other bullet point references to record evidence of the permanency of the bleachers, the following:

- Numerous photographs of the bleachers, provided to the trial court with ITW's motion, show that the bleachers are permanently erected on a steel frame and anchored in asphalt. *See* R. 42, pp. 27-40.

photographs, showing the hardware—heads of bolts that anchor the bleachers to their foundation—are included in the following record documents:

Record 42, page 32, top photograph;
Record 48, page 9, top two photographs; and
Record 48, page 10, lower right photograph.

If the Court requires enlargements of the photographs and specific identification of the hardware attaching the bleachers to the foundation, ITW will enlarge and re-submit the photographs.

B. If The Court Believes The Record Is Incomplete, It Should Remand With Instructions To The Trial Court And The Parties To Provide Additional Evidence.

The Court has, for the first time in Wisconsin, engaged in a "degree of physical annexation" analysis—used in other jurisdictions and advocated by the Kohns in this case—to decide whether the bleachers are an improvement to real property. *Kohn,* slip op. at 7.

In its analysis, the Court discusses the "extensive excavation" that would be required to move the pipes in the *Kallas* and *Wesley* cases. *Id.*[2] However, the effort required to move (or remove) a purported improvement to real property is not the test—the analysis involves the effort and expenditure undertaken to install the improvement. *See Kallas*, 66 Wis. 2d 386 (improvement to real property is "a permanent addition to or betterment of real property that enhances its capital value and that involves the expenditure of labor or money and is designed to make the property more useful or valuable as distinguished from ordinary repairs.").

Moreover, the same photographs that show the bleachers' attachments to the foundation, *see supra,* section I.A, also show that the land itself was altered in order to accommodate the

[2] The Court states that the "pipes could not be moved absent extensive excavation" in both *Kallas* and *Wesley*. *Kohn,* slip op. at 7. There is no indication in the *Kallas* decision that the pipes were underground, as the Kohns contend, or that they would require extensive excavation to move or remove.

bleachers. An asphalt foundation (or, for that matter, a level surface) is not the natural condition of the ground. There can be no question that excavation was required, a fact apparently critical to the Court's "degree of physical annexation" analysis.

To determine, as a matter of law, that the bleachers are not an improvement to real property simply because they "could be disassembled and moved," *Kohn,* slip op. at 7, places any improvement, except perhaps poured concrete or excavation, outside the protection of Wis. Stats. § 893.89(2).

Given the new test being employed by the Court, if the Court still believes the record is inadequate, it should remand this case with instructions to the trial court and the parties to fully address the nature of the attachment of the bleachers.

II. THE KOHNS WAIVED ANY ARGUMENT THAT THE BLEACHERS ARE NOT AN IMPROVEMENT TO REAL PROPERTY.

The Kohns did not, in their trial court briefs, argue that the bleachers are not an improvement to real property. *See* R. 41, 46, 51 and 57. Their failure constitutes a waiver of their right to make the argument. *See* ITW Br., Section II.A.

The Court's decision did not address the waiver issue—a threshold question of law which should have foreclosed, as an issue for appeal, the trial court's determination that the bleachers are an improvement to real property.

CONCLUSION

For the foregoing reasons, ITW respectfully requests that the Court reconsider its July 1, 2004 decision.

Dated: July 20, 2004.

LA FOLLETTE GODFREY & KAHN

By: _____

Josh Johanningmeier
State Bar No. 1041135

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STATE OF WISCONSIN CIRCUIT COURT LAFAYETTE COUNTY

ELAINE MARIE KOHN, a minor child, by her parents and natural guardians, Ronnie A. Kohn and Lori K. Kohn; RONNIE A. KOHN, individually; LORI K. KOHN, individually; and PHYSICIANS PLUS INSURANCE CORPORATION, a Wisconsin corporation,

Case No. 01 CV 048

Plaintiffs,

vs.

DARLINGTON COMMUNITY SCHOOLS, a political corporation and body politic, and EMC INSURANCE COMPANY, a foreign insurance corporation, and STANDARD STEEL INDUSTRIES, INC., a foreign corporation, and MEDALIST INDUSTRIES, INC., a Wisconsin corporation, and ILLINOIS TOOL WORKS, INC., a foreign corporation,

Defendants.

FILED
LAFAYETTE CO
APR 15 2002
CATHERINE [illegible]
CLERK OF COURTS

Summons

THE STATE OF WISCONSIN

To the above-named defendants:

You are hereby notified that the Plaintiffs named above have filed a lawsuit or other legal action against you. The Complaint, which is attached, states the nature and basis of the legal action.

Within forty-five (45) days of receiving this Summons, you must respond with a written answer, as that term is used in Chapter 802 of the Wisconsin Statutes, to the Complaint. The Court may reject or disregard an answer that does not follow the requirements of the statutes. The answer must be sent or delivered to the Court, whose address is 626 Main Street, Darlington, Wisconsin 53530, and to Plaintiffs' attorneys, Shneidman Hawks & Ehlke, S.C., whose address is 700 West Michigan Street, Suite 500, P.O. Box 442, Milwaukee, Wisconsin 53201-0442.

You may have an attorney represent you.

If you do not provide a proper answer within forty-five (45) days, the Court may grant judgment against you for the award money or other legal action requested in the Complaint, and you may lose your right to object to anything that is or may be incorrect in the Complaint. A judgment may be enforced as provided by law. A judgment awarding money may become a lien against any real estate you own now or in the future, and may also be enforced by garnishment or seizure of property.

Dated on this 12th day of April, 2002.

Respectfully submitted,

ELAINE MARIE KOHN, RONNIE A. KOHN
and LORI K. KOHN, Plaintiffs
By:

SHNEIDMAN, HAWKS & EHLKE, S. C.
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ATTORNEYS FOR PLAINTIFFS

STATE OF WISCONSIN CIRCUIT COURT LAFAYETTE COUNTY

ELAINE MARIE KOHN, a minor child, by her parents and natural guardians, Ronnie A. Kohn and Lori K. Kohn; RONNIE A. KOHN, individually; LORI K. KOHN, individually; and PHYSICIANS PLUS INSURANCE CORPORATION, a Wisconsin corporation,

Plaintiffs,

vs.

DARLINGTON COMMUNITY SCHOOLS, a political corporation and body politic, and EMC INSURANCE COMPANY, a foreign insurance corporation, and STANDARD STEEL INDUSTRIES, INC., a foreign corporation, and MEDALIST INDUSTRIES, INC., a Wisconsin corporation, and ILLINOIS TOOL WORKS, INC., a foreign corporation,

Defendants.

Case No. 01 CV 048

Amended Complaint

COME NOW, plaintiff Elaine Marie Kohn, by her parents and natural guardians, Ronnie A. Kohn and Lori K. Kohn, and plaintiffs Ronnie A. Kohn and Lori K. Kohn, individually, by their attorneys, Shneidman, Hawks & Ehlke, S. C., by David E. Lasker, Esq., Andrew J. Chevrez, Esq., and Laura C. Suess, Esq., and as and for their complaint against the above-named defendants respectfully allege and state to the court as follows:

1. Plaintiff Elaine Marie Kohn is a minor under the age of 18, who resides with her parents in the County of Lafayette, State of Wisconsin, at 218 East Cornelia Street, Darlington, Wisconsin 53530. Her date of birth is May 8, 1996.

2. Plaintiff Ronnie A. Kohn is an adult male resident of the County of Lafayette, State of Wisconsin, residing at 218 East Cornelia Street, Darlington, Wisconsin 53530. He is the father and natural guardian of plaintiff Elaine Marie Kohn and the husband of plaintiff Lori K. Kohn.

3. Plaintiff Lori K. Kohn is an adult female resident of the County of Lafayette, State of Wisconsin, residing at 218 East Cornelia Street, Darlington, Wisconsin 53530. She is the mother and natural guardian of plaintiff Elaine Marie Kohn and the wife of plaintiff Ronnie A. Kohn.

4. Plaintiff Physicians Plus Insurance Corporation is a Wisconsin corporation whose registered agent is Jon C. Nordenberg at the law firm of Boardman, Suhr, Curry & Field, L. L. P., and whose registered address is One South Pinckney Street, Suite 410, Madison, Wisconsin 53703. Subrogation services for Physicians Plus Insurance Corporation are provided by Health Care Cost Recovery, Inc., a Wisconsin corporation whose primary offices are located at 375 AMS Court, Suite 1, Green Bay, Wisconsin 54313 (Attention: Attorney Timothy Dolata). Physicians Plus Insurance Corporation is joined as a party plaintiff pursuant to §803.03(2)(a), Wis. Stats., because it may have claims based upon subrogation to the rights of the other plaintiffs because of health care provided to them.

5. Defendant Darlington Community Schools is a public school district, and, therefore, is a political corporation and body politic, whose principle agent is District Administrator

Joseph A. Galle. Said defendant's principle offices are located in the County of Lafayette, State of Wisconsin, at 11630 Center Hill Road, Darlington, Wisconsin 53530. Defendant Darlington Community Schools is the owner of all of the buildings, structures, and real or personal property of Darlington High School.

6. Defendant EMC Insurance Company is a foreign insurance corporation whose principle office is located at 717 Mulberry Street, Des Moines, Iowa 50309-3872. Its principle offices within the State of Wisconsin are located at 16455 West Bluemound Road, Brookfield, Wisconsin 53005. At all material times defendant EMC Insurance Company had in full force and effect a policy of liability insurance in which it was the insurer and defendant Darlington Community Schools was the insured and defendant EMC Insurance Company is obligated to pay for any and all liability to third parties, such as the plaintiffs herein, arising from the negligence of defendant Darlington Community Schools.

7. Defendant Standard Steel Industries, Inc. is a foreign corporation that incorporated in Michigan on November 1, 1954. Prior to its merger with Medalist Industries, Inc., its registered agent was Alvin J. Korth, 420 14th Street, Three Rivers Michigan 49093.

8. Defendant Medalist Industries, Inc. is a domestic corporation incorporated in Wisconsin on November 18, 1954. Its registered agent is CT Corporation System, 44 East Miffin Street, Madison Wisconsin 53703. Prior to its merger with defendant Illinois Tool Works, Inc., its principal office address was 10850 West Park Place, Suite 150, Milwaukee, Wisconsin 53224.

9. Defendant Illinois Tool Works, Inc., is a foreign corporation incorporated in Delaware whose principal office is located at 3600 West Lake Avenue, Glenview, Illinois 60025. Its registered agent is C.T. Corporation System, is 44 East Mifflin Street, Madison, Wisconsin 53703.

10. On June 13, 1969, defendant Standard Steel Industries, Inc. entered an agreement with the defendant Darlington Community Schools to supply the materials and the labor to install aluminum, portable elevated bleachers at the Darlington High School. Upon information and belief, Standard Steel Industries, Inc. erected said bleachers at the Darlington High School during the month of August 1969.

11. On September 30, 1975, Standard Steel Industries, Inc. merged into Medalist Industries, Inc., a Wisconsin corporation incorporated on November 18, 1954. The articles of merger between Standard Steel Industries, Inc. and Medalist Industries, Inc. that were duly filed with the Wisconsin Department of Financial Institutions identify Medalist Industries, Inc. as the surviving corporation.

12. On December 31, 1997, Medalist Industries, Inc. merged with its parent company, Illinois Tool Works, Inc., a Delaware corporation. The agreement of merger between Medalist Industries, Inc. and Illinois Tool Works, Inc. that were duly filed with the Wisconsin Department of Financial Institutions identify Illinois Tool Works, Inc. as the surviving corporation.

13. On the afternoon of Friday, September 29, 2000, plaintiff Lori K. Kohn was present with her daughter, plaintiff Elaine Marie Kohn, at Darlington High School to watch the Darlington Redbirds football game. Plaintiff Elaine Marie Kohn was then four and one-half years old. Plaintiff Lori K. Kohn paid an admission fee, and she and her daughter occupied seats on the bleachers owned by defendant Darlington Community Schools as spectators attending a recreational activity.

14. At approximately 2:30 p.m., through no fault of her own, plaintiff Elaine Marie Kohn fell through a large space at the foot of her seat in the bleachers to the hard surface

approximately 15 feet below the bleachers, immediately sustaining a fractured skull, epidural hematoma, neurological injuries, and grievous pain and suffering. Subsequent to the accident, the child's condition required her to have surgery and hospitalization for several days.

15. At all material times plaintiff Lori K. Kohn was exercising due diligence and care for the safety and well-being of her daughter, and plaintiff Elaine Marie Kohn was exercising all of the diligence and care that reasonably could be expected for a four and one-half year old child.

16. Defendant Darlington Community Schools had a duty of care which it owed to plaintiffs as frequenters of the public buildings and grounds owned by it, pursuant to the Wisconsin Safe Place Statute, §101.01, Wis. Stats.

17. Defendant Darlington Community Schools owns and supervises the Darlington High School and its premises and is the owner of the public buildings located on the premises of Darlington High School, including the bleachers located at Darlington High School, within the meaning of the safe place statute.

18. As the owner of the bleachers, defendant Darlington Community Schools had exclusive custody, control, and ownership of said structures as well as the non-delegable duty to provide its frequenters freedom from danger to their health, life, safety, or welfare, and it had the duty to furnish a safe place with regard to structural or physical defects or hazards of the public buildings and grounds it owns, including the bleachers at the high school football field.

19. Plaintiffs Elaine Marie Kohn and Lori K. Kohn were attending a public football game at the Darlington High School on September 29, 2000, and, therefore, were frequenters of the premises owned and maintained by defendant Darlington Community Schools within the meaning of the safe place statute.

20. Due to the negligent design, construction, and/or maintenance of the bleachers, the bleachers were inherently unsafe and posed a hazardous condition to frequenters of the Darlington High School on September 29, 2000.

21. Defendant Darlington Community Schools had actual or constructive notice of the existence of the hazardous condition, and, therefore, it knew or should have known of the danger that the condition of the bleachers posed to frequenters on the premises such as plaintiff Elaine Marie Kohn.

22. The serious injuries sustained by plaintiff Elaine Marie Kohn on September 29, 2000 were a direct and proximate consequence of the hazardous condition posed by the bleachers owned and maintained by defendant Darlington Community Schools.

23. Defendant Darlington Community Schools was negligent in failing to exercise reasonable care by taking adequate precautions to remedy the hazardous condition of the bleachers. Said defendant was further negligent in failing to adequately inform or give notice to others, including the plaintiffs, of the hazardous condition of the bleachers and the danger to which they were subjected.

24. On September 29, 2000, plaintiffs Lori K. Kohn and Elaine Marie Kohn had entered upon the premises as invitees at the invitation of defendant Darlington Community Schools. As such, defendant Darlington Community Schools owed a duty to them to exercise reasonable care for their safety and well-being.

25. Defendant Darlington Community Schools breached its duty to exercise reasonable care, and it failed to exercise ordinary or reasonable care. Had it exercised ordinary and reasonable care in discharging its duty to the plaintiffs, it should have and would have known the

danger the bleachers posed to invitees due to the negligent design, construction, and/or maintenance of the bleachers. The failure of defendant Darlington Community Schools to exercise ordinary or reasonable care concerning the design, construction, and/or maintenance of the bleachers created a foreseeable and unreasonable risk of harm to others, including plaintiffs.

26. The aforesaid negligence of defendant Darlington Community Schools and its failure to exercise due diligence and care to fulfill its duty to the plaintiffs was a direct and proximate cause of the fall of plaintiff Elaine Marie Kohn from the bleachers and the injuries sustained by her in that fall.

27. Because of the dangerously defective nature of the bleachers that existed when the product left the possession or control of the seller, Standard Steel Industries, Inc., the product caused harm. The condition of the bleachers supplied by Standard Steel Industries, Inc., subject it and its successor corporations to strict liability. The Plaintiffs' injuries and damages were caused by the bleachers purchased by the defendant Darlington Community Schools from Standard Steel Industries, Inc., which merged into Medalist Industries, Inc., a former subsidiary of Illinois Tool Works, Inc.

28. As the surviving corporation that assumed all of the obligations through the merger with Medalist Industries, Inc., its subsidiary, defendant Illinois Tool Works, Inc. is strictly liable to the Plaintiffs for injuries complained of herein as a direct and proximate result of the defective construction, design, and installation of the bleachers on the premises of the defendant Darlington High School.

29. As the direct and proximate result of the wrongdoing of defendants, plaintiff Elaine Marie Kohn was caused to suffer grievous head and neurological injuries both temporary and

permanent in nature, physical and mental trauma, extreme pain, suffering, and disability, and the need for therapy, counseling, and medical care and treatment, all to her damage in excess of $5,000.00.

30. As the direct and proximate result of the wrongdoing of defendants, plaintiffs Ronnie A. Kohn and Lori K. Kohn have incurred and will continue to incur substantial hospital, medical, and therapeutical expenses associated with the care of their daughter, and they have suffered a loss of society and companionship from and with their daughter, all to their damage in excess of $5,000.00.

31. As a further direct and proximate result of the wrongdoing of defendants, it was necessary for plaintiff Lori K. Kohn to cease employment in order to care for the needs of her daughter, whereby she suffered a loss of income in excess of $5,000.00.

A true copy of the authenticated complaint originally filed in this matter is attached hereto.

WHEREFORE, plaintiffs demand judgment against the defendants, jointly and severally, for the following:

1. compensatory damages in an amount deemed reasonable by the court;
2. plaintiffs' costs and disbursements in this action, including statutory attorneys' fees; and
3. such other and further relief as the court deems just and equitable.

Plaintiffs demand a trial by jury of six (6) persons as to all matters triable by jury.

Dated on this 12th day of April, 2002.

Respectfully submitted,

ELAINE MARIE KOHN, RONNIE A. KOHN
and LORI K. KOHN, Plaintiffs
By:

SHNEIDMAN, HAWKS & EHLKE, S. C.
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ATTORNEYS FOR PLAINTIFFS

COPY

STATE OF WISCONSIN CIRCUIT COURT LAFAYETTE COUNTY

ELAINE MARIE KOHN, a minor child, by her parents and natural guardians, Ronnie A. Kohn and Lori K. Kohn; RONNIE A. KOHN, individually; LORI K. KOHN, individually; and PHYSICIANS PLUS INSURANCE CORPORATION, a Wisconsin corporation,

Plaintiffs,

v.

Case No. 01 CV 048

DARLINGTON COMMUNITY SCHOOLS, a political corporation and body politic, and EMC INSURANCE COMPANY, a foreign insurance corporation, and STANDARD STEEL INDUSTRIES, INC., a foreign corporation, and MEDALIST INDUSTRIES, INC., a Wisconsin corporation, and ILLINOIS TOOL WORKS, INC., a foreign corporation,

Defendants.

FILED
JUL 25 2002
LAFAYETTE COUNTY CIRCUIT COURT
DARLINGTON, WISCONSIN

ILLINOIS TOOL WORKS, INC.'S AMENDED ANSWER, AFFIRMATIVE DEFENSES, COUNTERCLAIM AND CROSS CLAIMS

Defendant Illinois Tool Works, Inc. ("ITW"), by its counsel, LaFollette Godfrey & Kahn, hereby amends its June 4, 2002 Answer, Affirmative Defenses and Cross Claims pursuant to section 802.09, Stats. In response to Plaintiffs' Amended Complaint, ITW answers, paragraph by paragraph, as follows:

1. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph.

2. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph.

3. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph.

4. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph.

5. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph.

6. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph.

7. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph

8. Admits that Medalist Industries, Inc. was a domestic corporation incorporated in Wisconsin prior to its merger with ITW; its principal office address was in Milwaukee, Wisconsin; denies knowledge or information sufficient to form a belief as to the truth of the remaining allegations in this paragraph.

9. Admits.

10. On information and belief, admits that there was a proposal to erect the bleachers dated June 13, 1969, and states that, on or about June 18, 1969, Standard Steel Industries entered into a contract with Darlington Community Schools to provide materials for and supervise the erection of bleachers at the Darlington High School football field; denies that the bleachers installed are "portable." On information and belief, admit that the bleachers were erected in the month of August 1969.

11. Admits that Standard Steel Industries, Inc. was merged into Medalist Industries, Inc., a Wisconsin corporation; that Medalist Industries, Inc. was the surviving corporation; denies knowledge or information sufficient to form a belief as to the remaining allegations in this paragraph.

12. Admits.

13. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph.

14. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph.

15. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph.

16. The allegations of this paragraph are not directed at this answering defendant, and therefore no response is required.

17. The allegations of this paragraph are not directed at this answering defendant, and therefore no response is required.

18. The allegations of this paragraph are not directed at this answering defendant, and therefore no response is required.

19. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph.

20. Denies that the bleachers were negligently designed or constructed; denies any obligation by ITW or its predecessor(s) to maintain the bleachers; denies that the bleachers were inherently unsafe or posed a hazardous condition to frequenters of the Darlington High School on September 29, 2000.

21. Denies knowledge or information sufficient to form a belief as to the truth of the allegations of actual and constructive notice to Defendant Darlington Community Schools; denies that the bleachers posed a danger to frequenters of the Darlington High School.

22. Denies.

23. The allegations contained in this paragraph that Defendant Darlington Community Schools was negligent are not directed at this answering defendant, and therefore no response is required; denies the allegation that the bleachers presented a hazardous or dangerous condition.

24. The allegations contained in this paragraph that Defendant Darlington Community Schools owed a duty to plaintiffs are not directed at this answering defendant, and therefore no response is required; denies knowledge or information sufficient to form a belief as to the truth of the remaining allegations in this paragraph.

25. The allegations of this paragraph are not directed at this answering defendant, and therefore no response is required.

26. The allegations of this paragraph are not directed at this answering defendant, and therefore no response is required.

27. Denies the allegation in this paragraph that the bleachers were dangerously defective when they left Standard Steel Industries; denies that the bleachers caused harm; denies the legal conclusion that strict liability should be imposed; denies that the plaintiffs' injuries and damages were caused by the bleachers.

28. Admits that ITW is the surviving corporation from the merger with Medalist Industries, Inc. and that it assumed obligations of Medalist Industries, Inc. as part of the merger. The remainder of the paragraph states a legal conclusion for which an answer is not required.

29. Denies the allegation of "wrongdoing" in this paragraph; denies knowledge or information sufficient to form a belief as to the truth of the remaining allegations in this paragraph.

30. Denies the allegation of "wrongdoing" in this paragraph; denies knowledge or information sufficient to form a belief as to the truth of the remaining allegations in this paragraph.

31. Denies the allegation of "wrongdoing" in this paragraph; denies knowledge or information sufficient to form a belief as to the truth of the remaining allegations in this paragraph.

In response to the unnumbered, WHEREFORE paragraph and its sub-parts, denies that plaintiffs are entitled to any of the relief sought.

All allegations of the Amended Complaint not expressly admitted herein are hereby denied.

AFFIRMATIVE DEFENSES

As and for its affirmative defenses, ITW alleges as follows:

1. The Complaint, in whole or in part, fails to state a claim upon which relief can be granted.

2. Plaintiffs' damages, if any, were caused or contributed to by the acts, errors, or omissions of other persons, firms, entities or corporations, including plaintiffs, over whom or which ITW has and had no control or right of control and for whom or which it is not responsible.

3. Plaintiffs' purported claims are barred by, or should be dismissed pursuant to, the equitable doctrines of waiver, laches and/or estoppel.

4. Any alleged defective condition in the bleachers resulted from their unforeseeable alteration, abuse, misuse, and/or modification by plaintiffs and/or other persons, firms, entities or corporations over whom or which ITW has and had no control or right of control and for whom or which it is not responsible.

5. On information and belief, plaintiffs have failed to mitigate their alleged damages.

6. The bleachers and the warnings and instructions accompanying them at the time of sale by Standard Steel Industries conformed to the state-of-the-art and industry custom when they were designed, manufactured, and sold pursuant to generally recognized and prevailing standards and in conformance with the statutes, regulations, and requirements that governed them at the time of their manufacture by Standard Steel Industries.

7. At the time of sale by Standard Steel Industries, the bleachers were accompanied by directions and warnings which were not complied with by plaintiffs and/or other persons, firms, corporations, or entities over whom or which Standard Steel Industries and ITW have or had no control, or right of control and for whom or which they are not responsible.

8. Any recovery or settlement plaintiffs may have received from other individuals, firms, corporations, or entities must be subtracted from any recovery or judgment that plaintiffs might obtain from ITW.

9. Any settlement agreement or release relative to the incident described in the Complaint entered into by plaintiffs with any other individual, firm, corporation, or entity also releases ITW.

10. Any recovery by plaintiffs must be reduced or offset by any other amounts plaintiffs have received or will receive for the same injuries claimed in this lawsuit.

11. Plaintiffs' claims are barred by the statute of limitations contained in section 893.89, Stats.

12. These answering defendants hereby give notice that they intend to rely upon such other defenses as may become available or appear in this case, consistent with any order of the Court, and they hereby reserve the right to amend this Answer to assert any such affirmative defenses.

CROSS CLAIM

As and for its cross-claim against defendants Darlington Community Schools and EMC Insurance Company, ITW states as follows:

1. ITW realleges and incorporates herein by reference the admissions, denials, allegations, qualifications, and affirmative defenses set forth above.

2. If ITW is adjudged liable for any of the plaintiffs' alleged damages, then ITW is entitled to contribution and/or indemnification from defendants Darlington Community Schools and EMC Insurance Company for ITW's liability.

COUNTERCLAIM

As and for its counterclaim against plaintiff Lori K. Kohn, ITW states as follows:

1. ITW realleges and incorporates herein by reference the admissions, denials, allegations, qualifications and affirmative defenses set forth above.

2. On information and belief, at all times material hereto, Lori Kohn was negligent in her supervision and care of her minor child, plaintiff Elaine Marie Kohn.

3. To the extent Elaine Marie Kohn, Ronnie A. Kohn or Physicians Plus Insurance Corporation sustained any injuries or damages, those injuries or damages were proximately caused by the negligence of Lori Kohn.

4. If ITW is adjudged liable for any of Elaine Marie Kohn, Ronnie A. Kohn or Physicians Plus Insurance Corporation's alleged damages, then ITW is entitled to contribution and/or indemnification from plaintiff Lori Kohn.

WHEREFORE, defendant ITW requests that the Court grant judgment as follows:

A. dismissing the plaintiffs' claims with prejudice;

B. granting ITW judgment on its Cross-Claim;

C. granting ITW judgment on its Counterclaim;

D. awarding ITW its recoverable costs, disbursements and attorney fees; and

E. granting any further relief the Court deems just.

Dated: July 24, 2002.

LA FOLLETTE GODFREY & KAHN

By: _____

Richard M. Burnham
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STATE OF WISCONSIN CIRCUIT COURT LAFAYETTE COUNTY

ELAINE MARIE KOHN, a minor child, by her parents and natural guardians, Ronnie A. Kohn and Lori K. Kohn; RONNIE A. KOHN, individually; LORI K. KOHN, individually; and PHYSICIANS PLUS INSURANCE CORPORATION, a Wisconsin corporation,

Plaintiffs,

v.

DARLINGTON COMMUNITY SCHOOLS, a political corporation and body politic, and EMC INSURANCE COMPANY, a foreign insurance corporation, and STANDARD STEEL INDUSTRIES, INC., a foreign corporation, and MEDALIST INDUSTRIES, INC., a Wisconsin corporation, and ILLINOIS TOOL WORKS INC., a foreign Corporation,

Defendants.

Case No. 01 CV 048

MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

This case arises out of a small child's fall from the bleachers at a Darlington Redbirds football game. The bleachers—a permanent structure that transformed a grassy area into a football stadium and provided the Darlington community with years of use and enjoyment—were installed more than thirty-two years ago, and cannot be classified as anything other than an improvement to real property. As such, the statute of limitations for claims against Illinois Tool

Works Inc. ("ITW"), as successor to the company that sold and supervised the installation of the bleachers, has expired. Accordingly, there is no issue of material fact concerning the bleachers, and ITW is entitled to judgment as a matter of law.

I. UNDISPUTED FACTS

On June 18, 1969, defendant Darlington Community School District ("Darlington") entered an agreement with Standard Steel Industries, Inc. ("Standard Steel") to supply materials and supervise the installation of aluminum bleachers at Darlington High School. (Darlington's Resp. to Pls.' Interrog. No. 9 and Ex. B. thereto.) Standard Steel agreed to ship the materials in August 1969, for which Darlington paid $16,167.00. *Id.* The bleachers were erected in late August 1969.

Standard Steel and Medalist Industries, Inc. ("Medalist") merged in 1975, with Medalist as the surviving entity. (Pls.' Am. Compl. ¶ 11; ITW's Am. Answer ¶ 11.) Another merger occurred on December 31, 1997, when Medalist merged into its parent company, ITW. (Pls.' Am. Compl. ¶ 12; ITW's Am. Answer ¶ 12.)

Since the bleachers were installed, Darlington's maintenance supervisor has inspected them yearly and performed maintenance as necessary, including: replacing walkway planks, side rails, and footboards. (Darlington's Resp. to Pls.' Interrog. No. 10.) Neither Standard Steel, Medalist nor ITW ever had any maintenance responsibilities for the bleachers. (ITW Am. Answer ¶ 20.) In the course of Darlington's maintenance of the bleachers, they were never disassembled or moved. (Darlington's Resp. to Pls.' Interrogs. Nos. 10-14.) Rather, the bleachers have remained intact and in their present location since their 1969 installation. *See id.*

On September 29, 2000, more than 31 years after Standard Steel supplied materials for the Darlington High School bleachers, plaintiffs Lori and Elaine Kohn attended a Darlington

Redbirds football game. (Pls.' Am. Compl. ¶¶ 10-13.) The two of them sat on the bleachers. (Pls.' Am. Compl. ¶ 13.) At approximately 2:30 p.m., Elaine, then four-and-one-half years old, fell through the bleachers and sustained injuries. (Pls.' Am. Compl. ¶ 14.)[1]

The plaintiffs commenced an action against defendants Darlington and its insurer, EMC Insurance Company ("EMC"), on August 15, 2001, alleging Darlington breached its duty of care to plaintiffs Lori Kohn and Elaine Kohn as frequenters of the premises Darlington owned and maintained. (Pls.' Compl. ¶¶ 12-13.) Defendants Darlington and EMC answered and brought a counterclaim based on plaintiff Lori Kohn's negligent supervision of Elaine. (Darlington's Answer and Countercl. ¶¶ 2-3.) Plaintiffs commenced this action against Standard Steel, Medalist, and ITW[2] in their April 15, 2002 amended complaint claiming the bleachers were defective in construction, design and installation.[3] (Pls.' Am. Compl. ¶¶ 27-28.) Darlington and EMC filed a cross-claim against Standard Steel, Medalist, and ITW seeking indemnity or contribution for any liability resulting from the alleged defective design (Darlington's Cross-cl. ¶¶ 1-2) and a counterclaim based on plaintiff Lori Kohn's negligent supervision of Elaine. (Darlington's Countercl. ¶¶ 2-3.) Likewise, ITW cross-claimed against Darlington and EMC (ITW's Cross-cl. ¶¶ 1-2) and counterclaimed against plaintiff Lori Kohn for negligent supervision of Elaine, seeking indemnification or contribution for any damages assessed against ITW. (ITW's Countercl. ¶¶ 3-4.)

---

[1] ITW anticipates disputes over what the Kohns were doing at the time of Elaine's fall, but for purposes of this motion, those disputes are immaterial.

[2] Only ITW was served, as it is the only surviving entity of the three new defendants named in the Amended Complaint.

[3] Plaintiff Physicians Plus Insurance Corporation ("PPIC") also brought an action against all defendants asserting a right to recover its subrogation interests from any liable defendants. (PPIC's Second Am. Claim ¶ 3.)

II. ARGUMENT

A party is entitled to summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Sec. 802.08(2), Stats. "Summary judgment is thus consistent with the underlying purpose of the rules of civil procedure 'to secure the just, speedy and inexpensive determination of every action and proceeding.'" *Transportation Ins. Co. v. Hunzinger Constr. Co.*, 179 Wis. 2d 281, 290, 507 N.W.2d 136 (Ct. App. 1993). When faced with a summary judgment motion, the party opposing the motion must come forth with admissible evidence supporting its claims:

> [A] party seeking summary judgment must 'establish a record sufficient to demonstrate ... that there is no triable issue of material fact on any issue presented.' The ultimate burden, however, of demonstrating that there is sufficient evidence ... to go to trial at all ... is on the party that has the burden of proof on the issue that is the object of the motion.

Hunzinger, 179 Wis. 2d at 290 (citation omitted). "[O]nce sufficient time for discovery has passed, it is the burden of the party asserting a claim on which it bears the burden of proof at trial 'to make a showing sufficient to establish the existence of an element essential to that party's case.'" *Id.* at 291-92.

In this case, summary judgment is appropriate because there are no genuine issues of material fact. The sole material fact—the date the bleachers were completed—is undisputed and the task for the Court is to decide whether the fact fits the legislatively prescribed condition, *i.e.*, the statute of limitations. The burden is, of course, on the plaintiffs and cross-claiming co-defendants to show that their claims against ITW are timely—a burden they cannot meet. There can be no issue as to material fact because whether the bleachers are an improvement to real

property is a question of law for the Court to decide. *See Kallas Millwork Corp. v. Square D Co.*, 66 Wis. 2d 382, 385-86, 225 N.W.2d 454 (1975).

A. The Statute of Limitations for Improvements to Real Property Is Ten Years From the Date of Substantial Completion.

Chapter 893 of the Wisconsin Statutes includes a ten-year limitations period for actions arising out of improvements to real property.[4] The statute states, in pertinent part:

> **893.89 Action for injury resulting from improvements to real property.** (1) In this section, "exposure period" means the 10 years immediately following the date of substantial completion of the improvement to real property. (2) Except as provided in sub. (3), no cause of action may accrue and no action may be commenced, including an action for contribution or indemnity, against ... any person involved in the improvement to real property after the end of the exposure period, to recover damages for ... any injury to the person ... arising out of any deficiency or defect in the design, ... planning, supervision or observation of construction of, the construction of, or the furnishing of materials for, the improvement to real property. This subsection does not affect the rights of any person injured as the result of any defect in any material used in an improvement to real property to commence an action for damages against the manufacturer of producer of the material.
>
> (5) Except as provided in sub. (4), this section applies to improvements to real property substantially completed before, on or after April 29, 1994.

Sec. 893.89, Stats. Plaintiffs have not alleged that any material was defective (which would not matter, in any event, because Standard Steel did not manufacture the material) and the exceptions in subdivisions (3) and (4) do not apply. Therefore, Plaintiffs' claims and the cross claims for contribution and indemnity by Darlington and its insurer are time-barred by subsection (2) as falling outside the exposure period.

One of the policy reasons for statutes of limitations is not only implicated in this case, it is highlighted. The two major policy purposes behind statutes of limitations are: (1) to "deny a

[4] The predecessor to section 893.89, Stats., was section 893.155, Stats. That law was different in several respects, was attacked successfully on constitutional equal protection grounds in *Kallas*, was amended in 1976, was again successfully attacked on the issue of its retroactive application in *U.S. Fire Ins. Co. v. E.D. Wesley Co.*, 105 Wis. 2d 305, 313, N.W.2d 833 (1982), and, finally, in 1993, the current statute was enacted and has been in force, unaltered, since then.

court forum to those who have slept upon their rights"; and, (2) to "protect a defendant from stale claims and from lawsuits brought at a time when memories have faded and a defense becomes more difficult." *Rosenthal v. Kurtz*, 62 Wis. 2d 1, 7-8, 213 N.W.2d 741, 744 (1974), *citing Peterson v. Roloff*, 57 Wis. 2d 1, 203 N.W.2d 699 (1973); *State Farm Mut. Auto. Ins. Co. v. Schara*, 56 Wis. 2d 262, 268, 201 N.W.2d 758 (1972).

While this is not a case of a party sleeping on her rights, it is a classic example of the latter purpose for statutes of limitation. It has been more than thirty years since the bleachers were installed. Standard Steel, the company that sold them and supervised their installation, is no longer in existence. Its successor, Medalist, had nothing to do with the bleachers. Standard Steel's ultimate successor, ITW, is not even in the business of building bleachers.

B. The Definition of an "Improvement to Real Property" Under Section 893.89, Stats. is Simple and Applies Here.

Wisconsin courts have engaged in very little discussion of what is an "improvement to real property." In fact, courts have resorted to the common usage of the term, simply drawing on the dictionary definition of "improvement" and following it with a declaration that a property addition either does or does not fall within that definition. *See, e.g., U.S. Fire Ins. Co. v. E.D. Wesley Co.*, 105 Wis. 2d 305, 313, N.W.2d 833 (1982); *Kallas*.

The dictionary definition employed by the courts states that an improvement is:

> (A) permanent addition to or betterment of real property that enhances its capital value and that involves the expenditure of labor or money and is designed to make the property more useful or valuable as distinguished from ordinary repairs.

Kallas, 66 Wis.2d at 386, *citing* Webster's Third International Dictionary, 1965. The *Kallas* court also noted that it found similar definitions in Bouvier's Law Dictionary and Black's Law Dictionary. *Id.*

In *Kallas*, the court concluded that a high-pressure water system designed for fire protection constituted "an improvement to real property." *Id.*[5] Noting that the determination of what constitutes an "improvement" is a question of law and not of fact, the court applied the above definition and stated, "[U]nder these commonly accepted usages, it is apparent that the high-pressure water pipe designed for fire protection, as a matter of law, was 'an improvement to real property' within the meaning of [the predecessor to section 893.89, Stats.]." *Id.*

Similarly, in *Wesley*, the Supreme Court determined that an underground oil pipeline connected to equipment located on the defendant's property was an "improvement to real property." 105 Wis. 2d at 309. After referring to the same definition of "improvement" it used in *Kallas*, the court held "as a matter of law that when the pipeline was connected to the equipment located on the U.S. Oil Company's real property, that pipeline became an improvement to the oil company's real property." *Id.*

The old adage that says "if it looks like a duck, acts like a duck and sounds like a duck, it must be a duck," is apropos to the determination of what is an improvement to real property. Wisconsin law, as laid out by the Supreme Court, is equally clear—if it *looks* like an improvement to real property, and *acts* like an improvement to real property, it *is* an improvement to real property (within section 893.89, Stats.).

[5] As noted in footnote 4, the *Kallas* court held the statute was unconstitutional, but on grounds (equal protection) that have since been remedied by the Legislature.

C. The Bleachers Are an Improvement to Real Property and Were Installed in 1969—More Than Thirty Years Ago—Making All Claims Against ITW Untimely.

This Court must decide, as a matter of law, if the bleachers are an improvement to real property. *See Kallas* at 385-86. Under Wisconsin law, the answer to that question is yes, just as it would be in numerous other jurisdictions.[6]

Employing any of the above-discussed definitions—as well as common sense—the bleachers at the Darlington High School football field were obviously an improvement to real property. Like a pipeline or a water system, they must be considered an improvement subject to section 893.89, Stats. Their installation enhanced both the capital value of the field and its utility to the school and community. Once installed, they became an integral component of the Darlington football stadium. And, they were installed at considerable expenditure—a cost of $16,167.00. *See* Darlington's Resp. to Pls.' Interrog. No. 9 and Ex. B thereto. They certainly were not an "ordinary repair"—they were not repairs at all. The bleachers are actually grandstands, more akin to a stadium than simple bleachers. *See Id.*, Ex. C. (Photographs of the bleachers.) They cannot simply be folded up or moved—they are permanently erected and anchored to the property. In fact, in their 33 years at the Darlington High School, the bleachers have never been disassembled or moved. *Id.*, Darlington's Resp. to Pls.' Interrogs. Nos. 10-14.

And, equally as obvious, the bleachers were "substantially completed" more than ten years ago. In fact, they were completed more than 31 years before Elaine Kohn's fall. Neither Plaintiffs nor the cross-claiming Co-Defendants can craft any interpretation of the facts or law that will bring their claims within the ten-year exposure period.[7]

---

[6] *See* Section II.D, *infra.*

[7] Plaintiffs may contend that Elaine Kohn's claims against ITW survive the application of section 893.89, Stats., because she is a minor and entitled to two years beyond her 18th birthday to bring a cause of action pursuant to

D. The Bleachers Would Also, As a Matter of Law, Be An Improvement to Real Property in Other Jurisdictions With Similar Statutes.

One can readily reach the same conclusion under similar laws of other jurisdictions. The Seventh Circuit, for example, interpreting an Illinois statute very similar to section 893.89, Stats., has examined the phrase "improvement to real property" in great detail and reached a virtually identical, albeit more verbose, standard.[8] The Seventh Circuit has employed Black's Law Dictionary's definition of "improvement" to determine whether a property addition constitutes "improvement to real property." *See Garner v. Kinnear Mfg. Co.*, 37 F.3d 263 (7th Cir. 1994). Consequently, according to the U.S. Court of Appeals, an improvement is:

> A valuable addition made to property (usually real estate) or an amelioration in its condition, amounting to more than mere repairs or replacement, costing labor or capital, and intended to enhance its value, beauty or utility or to adapt it for new or further purposes.

Id. at 266. The U.S. Court of Appeals also laid out three criteria for use in the analysis of improvements to real property: (1) whether the addition was intended to be permanent or temporary; (2) whether it became an integral component of the overall system; and (3) whether the value and use of the property was enhanced. *Id.*

---

section 893.16, Stats. In this case, reliance on that section would be misplaced. That section is inapplicable to causes of action that accrued prior to July 1, 1980. *See* Sec. 893.16(5)(c), Stats. Because the ten-year exposure period for the bleachers, as an improvement to real property, ended in August 1979, no cause of action against ITW could have accrued after that date—well within the exception contained in section 893.16(5)(c).

[8] The Illinois statute reads, in pertinent part:

> [N]o action based upon tort, contract, or otherwise may be brought against any person for an act or omission of such person in the design, planning, supervision, observation or management of construction, or construction of an improvement to real property after 10 years have elapsed from the time of such act or omission.

735 ILCS 5/13-214(b).

The same U.S. Court of Appeals, in an earlier case relating to the same Illinois statute, also agreed with the following Illinois Court of Appeal's definition of improvement to real property: "an addition to real property amounting to more than mere repair or replacement, and which substantially enhances the value of the property." *Witham v. Whiting*, 975 F.2d 1342, 1346 (7th Cir. 1992). Applying that definition, the Court of Appeals held that a 40-ton main hoist crane was an "improvement to real property" for the purpose of the Illinois statute because it was constructed to site specifications, was not a standardized product and the manufacturer performed on-site activity. *Id.* at 1346-47.

Around the country, similar statutes of limitations[9]—related to the completion of improvements to real property—have been applied to cases involving roofs, insulation, fireplaces, ventilation systems, garage doors, basements, overhead monorail tracks, elevators and conveyor systems. *See generally: Defective Design—Wisconsin limitation of action statute for architects, contractors and others involved in design and improvement to real property,* 63 Marq. L. Rev. 87, 111 (1979).

CONCLUSION

None of the claims against ITW can survive summary judgment because the bleachers are an improvement to real property and subject to the ten-year statute of limitations contained in section 893.89, Stats. All of Plaintiffs' claims and the Co-Defendants' cross-claims against ITW are untimely and must be dismissed with prejudice.

[9] In some states, they are statutes of repose.

Dated: August 1, 2002.

LA FOLLETTE GODFREY & KAHN

By: _____

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COPY

STATE OF WISCONSIN CIRCUIT COURT LAFAYETTE COUNTY

ELAINE MARIE KOHN, a minor child, by her parents and natural guardians, Ronnie A. Kohn and Lori K. Kohn; RONNIE A. KOHN, individually; LORI K. KOHN, individually; and PHYSICIANS PLUS INSURANCE CORPORATION, a Wisconsin corporation,

Plaintiffs,

v.

DARLINGTON COMMUNITY SCHOOLS, a political corporation and body politic, and EMC INSURANCE COMPANY, a foreign insurance corporation, and STANDARD STEEL INDUSTRIES, INC., a foreign corporation, and MEDALIST INDUSTRIES, INC., a Wisconsin corporation, and ILLINOIS TOOL WORKS INC., a foreign Corporation,

Defendants.

FILED
LAFAYETTE CO.
AUG 0 2 2002
CATHERINE McGOWAN
CLERK OF COURTS

Case No. 01 CV 048

AFFIDAVIT OF JOSH JOHANNINGMEIER

STATE OF WISCONSIN)
) ss
COUNTY OF DANE)

Josh Johanningmeier, being duly sworn under oath, hereby states:

1. I am one of the attorneys for Illinois Tool Works Inc.

2. Attached hereto as Exhibit A is a true and accurate copy of Defendant Darlington Community Schools' Responses to Illinois Tool Works' First Set of Written Interrogatories and Requests for Production.

Josh Johanningmeier

Signed and sworn to before me this
1st day of August, 2002.

Notary Public, State of Wisconsin
My Commission Expires: 7/17/05
MN153443_1.DOC

STATE OF WISCONSIN : CIRCUIT COURT : LAFAYETTE COUNTY
CIVIL BRANCH

ELAINE MARIE KOHN, a minor Child, by her parents and natural guardians, Ronnie A. Kohn And Lori K. Kohn; RONNIE A. KOHN, individually; LORI K. KOHN, individually; and PHYSICIANS PLUS INSURANCE CORPORATION, a Wisconsin corporation;

Plaintiffs,

Case No.: 00-CV-048
Code No.: 30108

-vs-

DARLINGTON COMMUNITY SCHOOLS, a political corporation and body politic, and EMC INSURANCE COMPANY, a foreign insurance corporation

Defendants,

DEFENDANT DARLINGTON COMMUNITY SCHOOLS' RESPONSES TO ILLINOIS TOOL WORKS' FIRST SET OF WRITTEN INTERROGATORIES AND REQUESTS FOR PRODUCTION

INTERROGATORY NO. 1: Please identify the individual(s) who assisted in preparing answers to these interrogatories and requests for production, stating which person supplied information for the answering of each interrogatory or request.

RESPONSE NO. 1: Joe Galle with the assistance of Mingo & Yankala, S.C., attorneys for defendants.

INTERROGATORY NO. 2: Please identify each person known to you of to persons acting on your behalf who have personal knowledge of any of the facts at issue in this lawsuit.

EXHIBIT
A

For each such person, state his or her name and specify the matters of facts about which he or she has personal knowledge

RESPONSE NO. 2: Object on the basis that the interrogatory is premature as discovery in this matter is still pending. Subject to and without waiving such objection, state that the plaintiff, Lori Kohn, Ronnie Kohn, Stan Krahenbuhl, Rock Richie and Craig Hunter witnessed the incident. Joseph Galle is the current superintendent of the Darlington Community School District. Further state that the plaintiff's medical providers possess information regarding the claimed injures.

INTERROGATORY NO. 3: Please identify each person known to you or to persons acting on your behalf who have personal knowledge regarding Darlington's compliance with job training, maintenance training, safety training, safety campaign repairs, recall or service bulletin repairs, applicable to *all* bleachers owned, assembled, disassembled, maintained or repaired by Darlington. For each such person, state his or her name and job title and specify the matters of facts about which he or she has personal knowledge.

RESPONSE NO. 3: Stan Krahenbuhl, Maintenance Supervisor. Mr. Krahenbuhl would have personal knowledge regarding the general maintenance of the bleachers.

INTERROGATORY NO. 4: Please identify each person known to you or to persons acting on your behalf who have personal knowledge regarding Darlington's purchase, assembly, maintenance, service, repair, relocation of other alteration to the bleachers. For each such person, state his or her name and job title, and specify the matters or facts about which he or she has personal knowledge.

RESPONSE NO. 4: See response to Interrogatory No. 3.

INTERROGATORY NO. 5: Please identify each person known to you or to persons acting on your behalf who have personal knowledge regarding Darlington's purchase, assembly, maintenance, service, repair, relocation or other alteration of *all* bleachers in addition to the subject bleachers. For each such person, state his or her name and job title and specify the matters or facts about which he or she has personal knowledge.

RESPONSE NO. 5: See response to Interrogatory No. 3.

INTERROGATORY NO. 6: For each person identified in your answer to Interrogatories Nos. 4 and 5, state their employment position held on September 29, 2000, the length of time held in that position as of September 29, 2000 and the total length of time employed by Darlington as of September 29, 2000.

RESPONSE NO. 6: Mr. Krahenbuhl has been employed by Darlington as the Maintenance Supervisor for approximately eight years.

INTERROGATORY NO. 7: For each person identified in your answers to Interrogatories Nos. 4 and 5, stated whether he or she is currently employed by Darlington, the employment position currently held and the length of time he or she has been in that position.

RESPONSE NO. 7: See response to Interrogatory No. 6.

INTERROGATORY NO. 8: For each person identified in your answers to Interrogatories Nos. 4 and 5 who is no longer employed by Darlington, state the reason(s) why

he or she is no longer employed by Darlington, his or her current or last-known employer, the positions held while employed by Darlington and the time period he or she was employed in each position.

RESPONSE NO. 8: Not applicable.

INTERROGATORY NO. 9: Please state the date the bleachers were purchased, from whom or what entity they were purchased, the price paid, who was present at the time of purchase, the purpose for which the bleachers were purchased, and any additions or accessories purchased with the bleachers or at a later date.

RESPONSE NO. 9: The bleachers were purchased on June 18, 1969. The price paid was $16,167.00. Present at the time of purchase were Robert Dosedel, Superintendent and Hugh Dougherty. The bleachers were purchased for seating at the Darlington High School athletic field. A press box and wheelchair-accessible section were added at later dates.

INTERROGATORY NO. 10: Please describe all maintenance or alteration that you or anyone on your behalf has performed on the bleachers from the date of the purchase to the present, stating the dates of maintenance, persons performing such maintenance and identifying all documents received or generated as a result of such maintenance.

RESPONSE NO. 10:

- Every spring, Stan Krahenbuhl performs a visual inspection of the bleachers.
- Yeazle Painting sandblasted and repainted the bleachers. The date is unknown at this time. Any documentation of the sandblasting/painting will be forwarded upon discovery and receipt.

- In 1997, Mr. Krahenbuhl replaced several of the walkway planks. There exist no records of these repairs.
- External improvements were made to the pressbox portion of the bleachers. The exact date and the entity performing the work are unknown at this time. Any documentation regarding these improvements will be forwarded upon discovery and receipt.
- In the summer of 2002, side rails were replaced and wooden footboards were replaced to eliminate dry rot. See "Exhibit A," attached.

INTERROGATORY NO. 11: Please state with particularity each occasion upon which the bleachers, or any component of the bleachers were delivered to any person or entity other than Darlington for repair, including the dates of each delivery, the person or entity to which the bleachers were delivered, the number of days the bleachers were in the possession of the person or entity, the reason the bleachers were delivered to such person or entity, the action taken by the person or entity and the results of each such action.

RESPONSE NO. 11: None.

INTERROGATORY NO. 12: For each inspection, examination or test of any part of the bleachers or components from the bleachers, *by anyone at any time*, specify the date and place of each inspection, examination or test; identify each person conducting, participating in or attending each inspection, examination or test; describe the items of equipment, parts of components that were inspected, examined or tested; and describe each part or component, if any, that was removed from the bleachers at the time of the inspection, examination or test.

RESPONSE NO. 12: Each spring, Stan Krahenbuhl performs a visual inspection of all visible portions of the bleachers. The dates of these inspections are unknown.

INTERROGATORY NO. 13: Identify each document you received from Standard Steel Industries, Inc., Medalist Industries, Inc. or Illinois Tool Works, Inc. in connection with the purchase and any assembly of, addition, alteration, modification to or repair of the bleachers.

RESPONSE NO. 13: See "Exhibit B," attached. Documentation regarding the pressbox and wheelchair accessible section will be forwarded upon discovery and receipt.

INTERROGATORY NO. 14: Describe in detail all maintenance, storage, movement, repair of other alterations to the bleachers by Darlington since they were purchased.

RESPONSE NO. 14: See response to Interrogatory No. 10.

INTERROGATORY NO. 15: With respect to the delivery and installation of the bleachers:

(a) Please identify the individual or entity that delivered the bleachers to Darlington Community Schools;

(b) Please identify the individual or entity that installed or assembled the bleachers at Darlington Community Schools;

(c) Please describe in detail the assembly required for the bleachers to be put into service at Darlington Community Schools.

RESPONSE NO. 15:

(a) Object on the basis that the Interrogatory is vague and ambiguous. Subject to and without waiving such objection, state that Standard Steel Industries, Inc. delivered the bleachers. See "Exhibit B," attached.

(b) State that the identity of the party that installed the bleachers is unknown at this time. Further state that Standard Steel Industries, Inc. supervised the installation. See "Exhibit B," attached.

(c) Object on the basis that the interrogatory is overly broad and unduly burdensome. Subject to and without waiving such objection, state that the answer is unknown.

INTERROGATORY NO. 16: Have the bleachers ever been involved in any accident or incident, other than the accident forming the basis for this action? If so, please state: the date of each such accident; the precise nature of any damage to the bleachers resulting therefrom; a description of the repair work done after each such accident; and the names and addresses of the person, firm, corporation, business or other organization that performed such repair work.

RESPONSE NO. 16: No.

INTERROGATORY NO. 17: Please describe by manufacturer, model, size, capacity, date of purchase, date of delivery, installation and assembly of *all bleachers*, other than the subject bleachers, used by Darlington since the subject bleachers were purchased and installed.

RESPONSE NO. 17: In addition to the subject bleachers, there is a set of bleachers on the athletic field opposite from the subject bleachers. These bleachers were purchased, delivered, installed and assembled concurrent with the subject bleachers. These bleachers were

manufactured by Standard Steel Industries, Inc. The subject "home" bleachers have fifteen rows at 102 feet long. The "visitor" bleachers have ten rows at 90 feet long.

INTERROGATORY NO. 18: Please identify all documents Darlington has received from Standard Steel Industries, Inc. Medalist Industries, Inc. or Illinois Tool Works, Inc. pertaining to or applicable to the bleachers.

RESPONSE NO. 18: See Exhibit B, attached.

INTERROGATORY NO. 19: Please identify all documents Darlington has received from *any* source regarding *any* bleachers.

RESPONSE NO. 19: Object on the basis that the interrogatory is overly broad and unduly burdensome. Subject to and without waiving such objection, see Exhibits A and B, attached.

INTERROGATORY NO. 20: Please identify all instructions, owner's manuals of service, maintenance or repair manuals used by you for the assembly, maintenance, repair, removal, storage or disassembly of the bleachers.

RESPONSE NO. 20: Not applicable.

INTERROGATORY NO. 21: For each set of instructions, owner's manual or service, maintenance or repair manual identified in your response to Interrogatory No. 20, please state the method used to obtain the respective manual.

RESPONSE NO. 21: Not applicable.

INTERROGATORY NO. 22: Please identify each statement obtained by you or on your behalf with regard to the subject matter of this litigation.

RESPONSE NO. 22: Object on the basis that the interrogatory calls for the disclosure of attorney work product. Subject to and without waiving such objection, not applicable.

INTERROGATORY NO. 23: Please identify each person you expect to call as an expert witness at the trial of this case, stating the subject matter on which the person is expected to testify, the substance of the facts and opinions to which such persons are expected to testify and a summary of the grounds for each opinion. Please also provide each expert's current CV, resume or other summary of qualifications.

RESPONSE NO. 23: Expert witnesses will be named pursuant to the terms of the Court's scheduling order.

REQUEST FOR PRODUCTION OF DOCUMENTS

REQUEST NO. 1: Each document identified or referenced in you answers the foregoing interrogatories which is in your possession or subject to your control. For each document, identify the particular interrogatory to which it corresponds.

RESPONSE NO. 1: See Exhibits A and B, attached.

REQUEST NO. 2: Each document which evidences the claim or interest of any person in this litigation or any recovery herein.

RESPONSE NO. 2: See pleadings previously submitted.

REQUEST NO. 3: Each report made by or for any police agency, governmental entity, fire department or ambulance service with respect to any aspect of the subject litigation.

RESPONSE NO. 3: Not applicable.

REQUEST NO. 4: Each report or other written memoranda of any kind relating in any way to this litigation, including but not limited to each document (including photographs) related to inspections or tests of the bleachers involved in the accident.

RESPONSE NO. 4: Defendants possess no such records at this time beyond the report of B&B Erectors provided by plaintiff's counsel.

REQUEST NO. 5: All hospital records, progress reports, discharge summaries or other documents which are a record of Elaine Kohn's stay in a hospital or of any diagnostic test performed on her at any time after the accident.

RESPONSE NO. 5: This request is properly directed to the plaintiff.

REQUEST NO. 6: Each medical report, document, piece of paper or writing whatsoever that evidences in any way the nature, type and extent of any injury which it is contended Elaine Kohn sustained in the accident.

RESPONSE NO. 6: See response to Request No. 5.

REQUEST NO. 7: Each document evidencing any special damages for which recovery is sought in this case.

RESPONSE NO. 7: See response to Request No. 5.

REQUEST NO. 8: All documents evidencing the medical expenses for Elaine Kohn and the identity of each person of entity incurring liability for such expenses.

RESPONSE NO. 8: See response to Request No. 5.

REQUEST NO. 9: Each document that evidences any claim relating to the accident in issue made against ITW, including each release, covenant not to sue, loan receipt, *Perringer* release or other settlement agreement.

RESPONSE NO. 9: See plaintiff's amended complaint.

REQUEST NO. 10: Each photograph, slide, computer animation, film, videotape or moving picture relating to any issues in this lawsuit.

RESPONSE NO. 10: See "Exhibit C," attached.

REQUEST NO. 11: A copy of the applicable EMC Insurance Company policy and declarations page for this claim.

RESPONSE NO. 11: A certified copy of the policy has been requested and will be provided upon receipt.

REQUEST NO. 12: Each statement concerning this action or its subject matter, previously made by any party hereto or any other person, not a party hereto, that is in your possession or subject to your control.

RESPONSE NO. 12: Object on the basis that the request calls for the potential disclosure of attorney work product. Subject to and without waiving such objection, not applicable.

REQUEST NO. 13: All communications between Darlington and EMC Insurance Company related to this claim and lawsuit.

RESPONSE NO. 13: Object on the basis that the request calls for the disclosure of attorney work product and information that is subject to the attorney-client privilege.

REQUEST NO. 14: Each document, including final reports, prepared in whole or in part by any consultant retained in this case or expert you expect to testify at trial on the subject matter and in connection with those matters about which the expert is expected to testify at trial.

RESPONSE NO. 14: Object on the basis that the request calls for the potential disclosure of attorney work product. Subject to and without waiving such objection, not applicable.

STATE OF WISCONSIN)
) SS
COUNTY OF _____)

AS TO ANSWERS:

Joseph Galle, a duly authorized representative of the Darlington Community Schools, being first duly sworn on oath, deposes and states that he has read the foregoing Answers to Interrogatories and Requests for Production by him subscribed and knows the contents thereof; that said Answers were prepared with the advice of counsel; that the Answers set forth herein, subject to inadvertent or undiscovered errors, are based on, and therefore, necessarily limited by the records and information still in existence, presently recollected, and thus far discovered in the course of the preparation of these Answers; that consequently he reserves the right to make any changes to the Answers if it appears at any time that omissions or errors have been made therein, or that more accurate information is available; and that subject to the limitations set forth herein, the said Answers are true to the best of his knowledge, information and belief.

JOSEPH GALLE

Subscribed and sworn to before me
This 17 day of July, 2002.

Connie R. Ubersox

NOTARY PUBLIC, State of Wisconsin
My commission 10-20-02.

AS TO OBJECTIONS:

Dated at Milwaukee, Wisconsin this 18th day of July, 2002.

MINGO & YANKALA, S.C.

JON D. MONSON
State Bar No.: 1037976
Attorneys for Defendants
Darlington Community Schools and
Employers Mutual Casualty Company

Post Office Address:
One Plaza East, Suite 1225
330 E. Kilbourn Avenue
Milwaukee, WI 53202
(414) 273-7400

EXHIBIT A

Gerber Leisure Products, Inc.

P.O. Box 5513 Madison, WI 53705 (608) 836-1165 1-800-236-7758 FAX (800) 909-5059

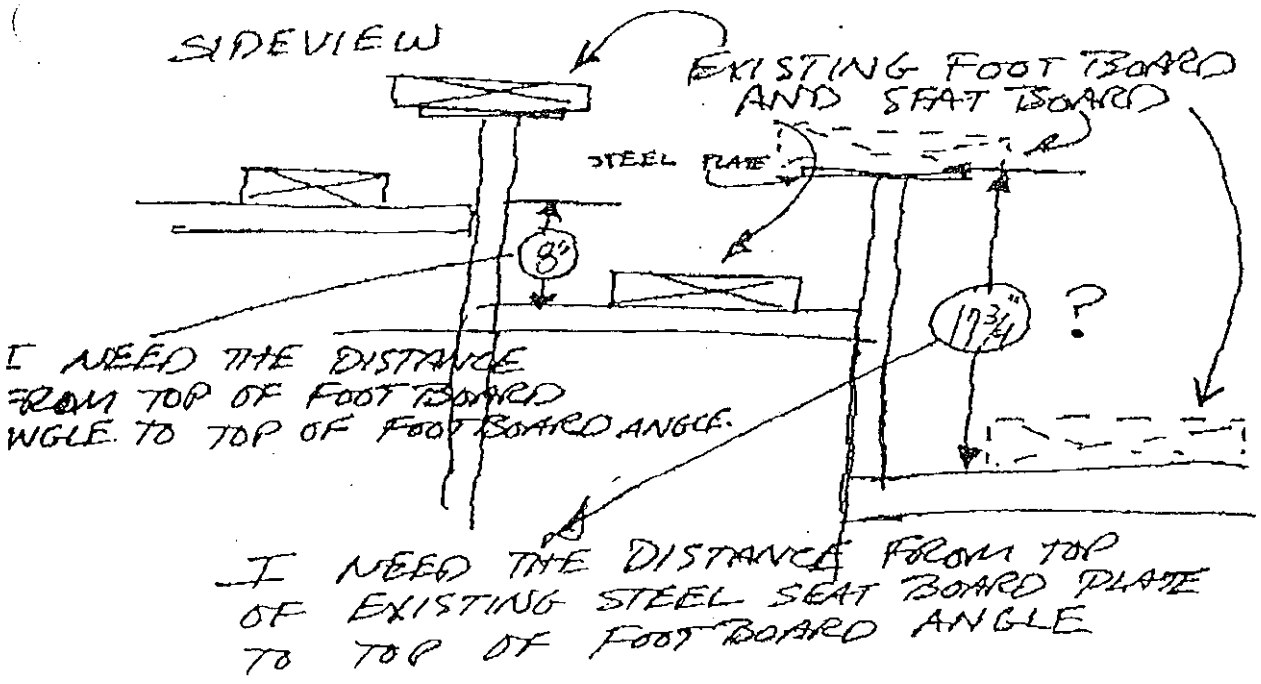
DATE 6-6-02

TO STAN KRAHENBUHL, BUILDING & GROUNDS.

FROM BOB SZALKOWSKI

RE BLEACHER MEASUREMENT

PLEASE MEASURE THE FOLLOWING AREA BELOW ON THE HOME AND VISITOR SIDES AND FAX BACK TO ME AT 608-437-3099. THANKS.



Gerber Leisure Products, Inc.

P.O. Box 5613 Madison, WI 53705 (608) 836-1165 1-800-236-7758 FAX (800) 909- 5059

Date: June 4, 2002
To: Mr. Joe Galle, District Administrator, Darlington Community Schools
From: Bob Szalkowski
Re: Bleacher Improvements

Thank you for taking the time to meet with me regarding your High School bleacher improvement project. To solve the problem with the side guardrail fencing we are proposing to remove your existing side rails and supports and install new aluminum channel side rail supports with a three rails system and fence. To have a consistent finish for the front of the bleachers we are also proposing to remove your existing horizontal rail and install two new aluminum rails with fencing. The new supports will provide a better connection for the fencing and visually match the aluminum seating, risers and foot boards. The existing rear guard rails and supports would be used and a vertical member would be added to each end to securely fasten the fencing. The riser for row 15 would be set at the mid point to reduce the opening to roughly 3 ½" above and below.

The above improvements would be done to both the Home and Visitor side bleachers. Prices do not include removal of old wood planking and hardware.

June 4 Bid

Home Side Bleacher 15 row x 102' long.	
New Planking and Fencing Materials Installed.	$ 31,717.00
New Side Guard Rail System Uprights and Aluminum Rails plus New front horizontal rails.	$ 870.00
Total Project Installed	$ 32,587.00
Visitor Side Bleachers 10 row x 89'6" long.	$ 21,526.00
New Side Guard Rail System Uprights and Aluminum Rails plus New front horizontal rails.	$ 540.00
Total Project Installed	$ 22,066.00
PROJECT TOTAL FOR BOTH BLEACHERS.	$ 54,653.00

Following your approval this week we can schedule the installation for the end of July or early August.

If you have any questions please call me at 1-800-236-7758 or at my home office number at 608-437-3622.

Bob Szalkowski

EXHIBIT B

standard steel industries, inc.

Three Rivers, Michigan 49093, U.S.A. Phone (616) 279-5211

PROPOSAL

Date June 13, 1969

PLEASE INVOICE DIVISION IF NOTED
- [x] BLEACHER DIVISION
- [ ] STEEL SALES DIVISION
- [ ] WARD AERO DIVISION

To: Darlington High School
Darlington, Wisconsin

F.O.B. Darlington, Wisconsin
Terms: 50% with purchase order
50% on erection

State Sales Tax Not Included [x] Included [ ]

We hereby propose to furnish all ~~labor and~~ material for

PORTABLE ELEVATED BLEACHERS

(1) Section 10 rows x 90'-0" 8" rise x 24" back to back
(3) Guard Rails End and Rear
(3) Aisles
(2) 60" steps
(1) 50" Walkway elevated 30" above grade

(1) Section 15 rows x 102'-0" 8" rise x 24" back to back
(3) Aisles
(3) Guard Rails End and Rear
(5) Steps
(1) 50" Walkway elevated 30" above grade

1,494 Net Seats @ 18"

Delivered to your site, with supervision to erect, plus any increase in freight, ~~for the sum of~~ . . . ~~$13,815.00~~

Same as above, with Aluminum seats $16,167.00
plus any increase in aluminum.

App. 067

Delivery: March or April

For the sum of Sixteen thousand one hundred sixty ~~Dollars~~ ($16,167.00)

This proposal is valid for a period of 30 days from date submitted.

Accepted by: at Regular Meeting - June 17, 1969
Sch. School Dist #12, Darlington
Organization
Robert L. Dowdell, Supt.
Name
6-18-69
Date

Respectfully submitted,
Hugh Dougherty
Hugh Dougherty

This proposal is furnished in duplicate. If accepted, and used in lieu of Purchase Order, please sign company copy and return to Standard Steel Industries, Inc.

(WHITE—CUSTOMER COPY) (GREEN—COMPANY COPY) (SALMON—FILE COPY)

SI-018 REV. 6-68

☐ IMMEDIATE REPLY PLEASE ☐ NOTE ENCLOSURES

☐ REPLY NO LATER THAN _____

3:00

standard steel industries, inc.
Three Rivers, Michigan 49093, U.S.A. Phone (616) 279-5211

☐ BLEACHER DIVISION
☐ STEEL SALES DIVISION
☐ WARD AERO DIVISION

TO

Darlington Comm. Schools
Joint Dist. No. 12
Darlington, Wisconsin 53530

SUBJECT _____

MESSAGE DATE 8/25

Attn: Mr. Dosedel, Sup't.

fold

Enclosed, please find the press box blueprints as requested.

Your aluminum is being shipped Wednesday or Thursday, Aug 27 or 28.

SENT BY Hugh Dougherty

REPLY DATE

ANSWERED BY _____

Send white and pink copies with carbon intact. Pink copy is returned with reply.

Form #PK-1 © Business Envelope Mfrs. Inc.
Pearl River, New York • Melrose Park, Ill.

June 11, 1969

The school boards of Argyle and Darlington school systems met jointly at the high school lunch room. The meeting was called to order by J. Lewis Burke, president of the Darlington board at 8:00 P.M. all members of the Darlington board WERE present, Three members of the Argyle board WERE present. Mr. Robert Morrison of CESA #14 presented which the purpose of the meeting was to discuss the study that was made by the State Department of Public instruction in regard to merging the Argyle and Darlington districts.

Mr. Fonstad of the State Department of Public Instruction then discussed or explained the study that was made.

This was an informal meeting and the boards talked about the pros and cons of the merger if it came about. No official action was taken on the matter.

Meeting adjourned at 10:30 P.M.

Signed;
E. B. Virtue, Dist. Clerk.

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June 17, 1969
Darlington, Wis.

Regular meeting of the board was called to order at the new high school at 8:00 P.M. by board president J. Lewis Burke. Present were Burke, Siegenthaler, Mrs. Stauffacher, Tuescher, Dr. Olson and Virtue. Absent were Martens, Tayler and Larson. Mr. Dosedel, Mr. Stevenson and Mr. Stacy attended the meeting.

Minutes of previous meetings were read and approved as read.

It was moved by Tuescher and seconded by Dr. Olson that the Treasurer's report as of 5-31-69 be adopted. Carried.

Motion was made by Siegenthaler and seconded by Mrs. Stauffacher that all bills be paid as listed and audited, including Title I and Title II bills. Carried.

A motion was made by Mrs. Stauffacher and seconded by Dr. Olson that we contract with Al's Trucking Co. for regular transportation of students for a three year term beginning July 1, 1969 on an amended contract basis every fiscal year, and that the district officers be

authorized to sign t contract. Provisionsfor a ial negotations for bus drivers salary, the number of buses and the actual increase and or decrease for equipment costs be contained in the contract. Carried.

Motion by Siegenthaler and seconded by Tuescher that we purchase bleachers with aluminum seats, for the new athletic field from the Standard Steel Industries, according to the bid they submitted. Carried.

Motion by Siegenthaler and seoonded by Dr. Olson that we ban the use of spikes of any kind on our athletic track and runnways at any time. Carried.

Motion by Virtue and seconded by Dr. Olson that we engage Meythaler & Caton, Platteville, Wis. to audit all district accounts for the fiscal year 1968-69. Carried.

It was moved by Dr. Olson and seconded by Siegenthaler that we accept the resignation of Roger Williams for the 1969-70 school year. Carried.

Motion by Tuescher and seconded by Mrs. Stauffacher that we join the Wis. Assoc. of School Boards for 1969-70. Carried.

Motion by Mrs. Stauffacher and seconded by Siegenthaler that we adjourn this meeting subject to the call of the district clerk, meeting was adjourned at 11:15 P.M. Carried.

Signed;
E. B. Virtue
E. B. Virtue, Dist. Clerk

****

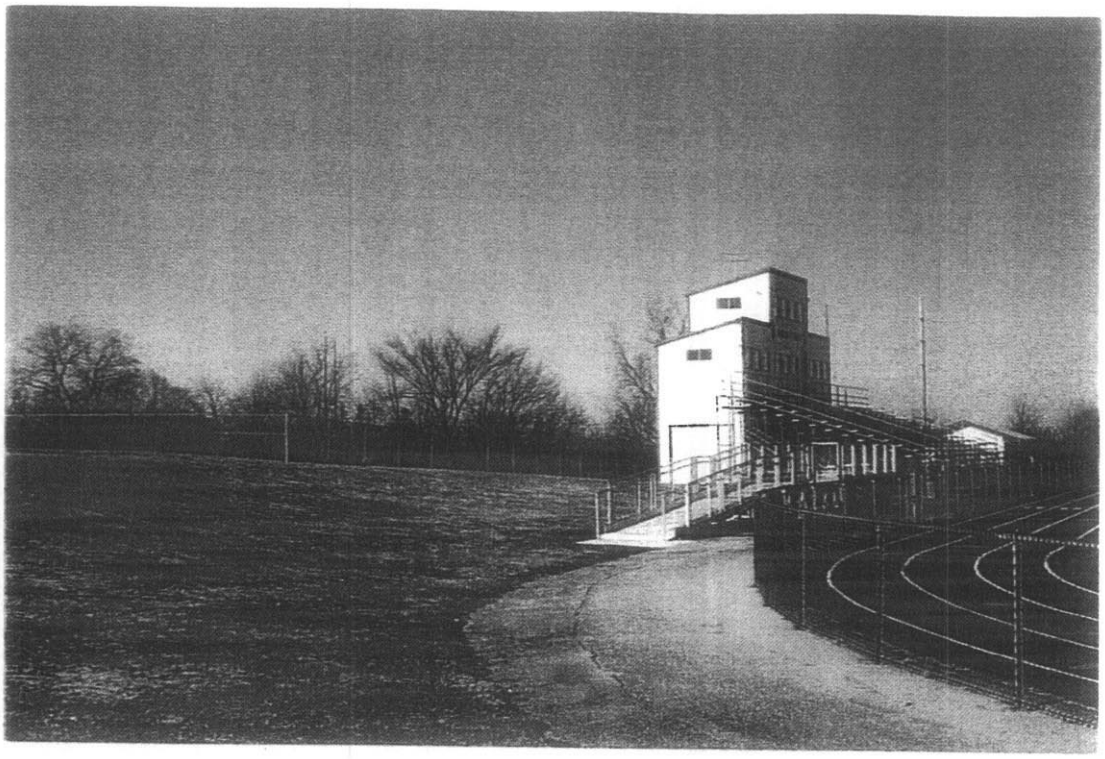
Darlington, Wis.
June 26, 1969

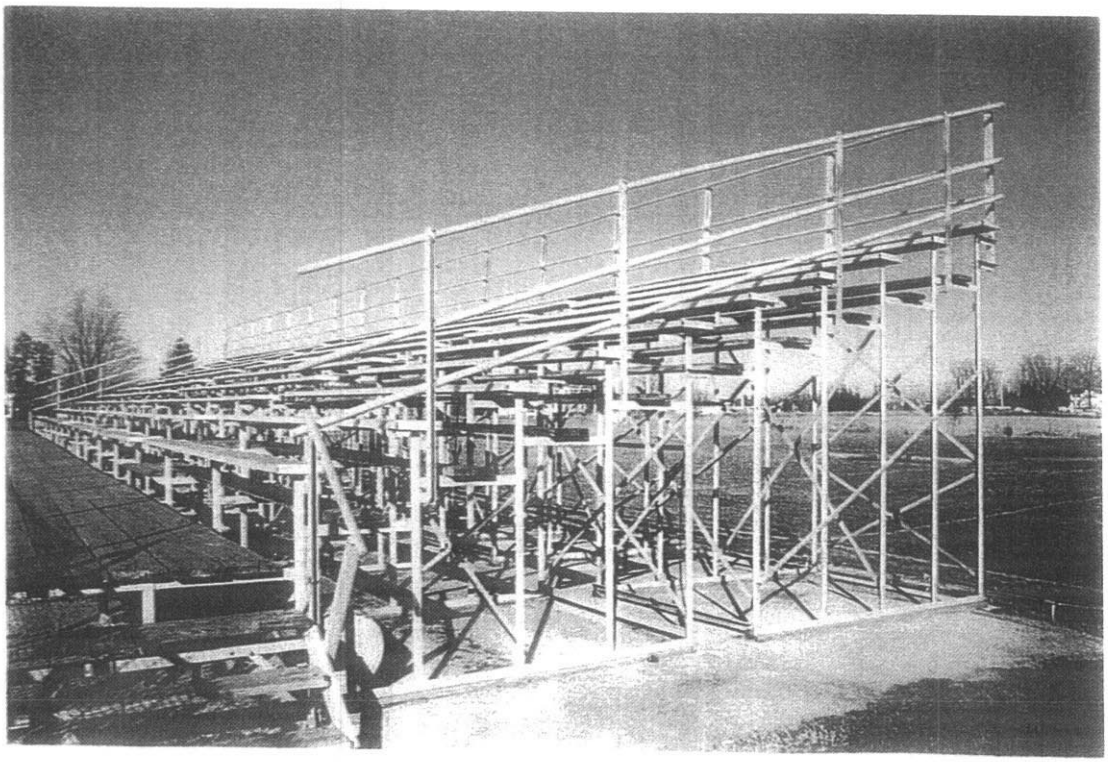
Special meeting of the board was called to order at 8:00 P.M. at the new high school on the above date by board president J. Lewis Burke. Present were Burke, Mrs. Stauffacher, Siegenthaler, Tuescher, Dr. Olson, Larson Martens, Taylor and Virtue. No one absent. Mr. Dosedel, Mr. Stevenson, and Mr. Stacy attended the meeting.

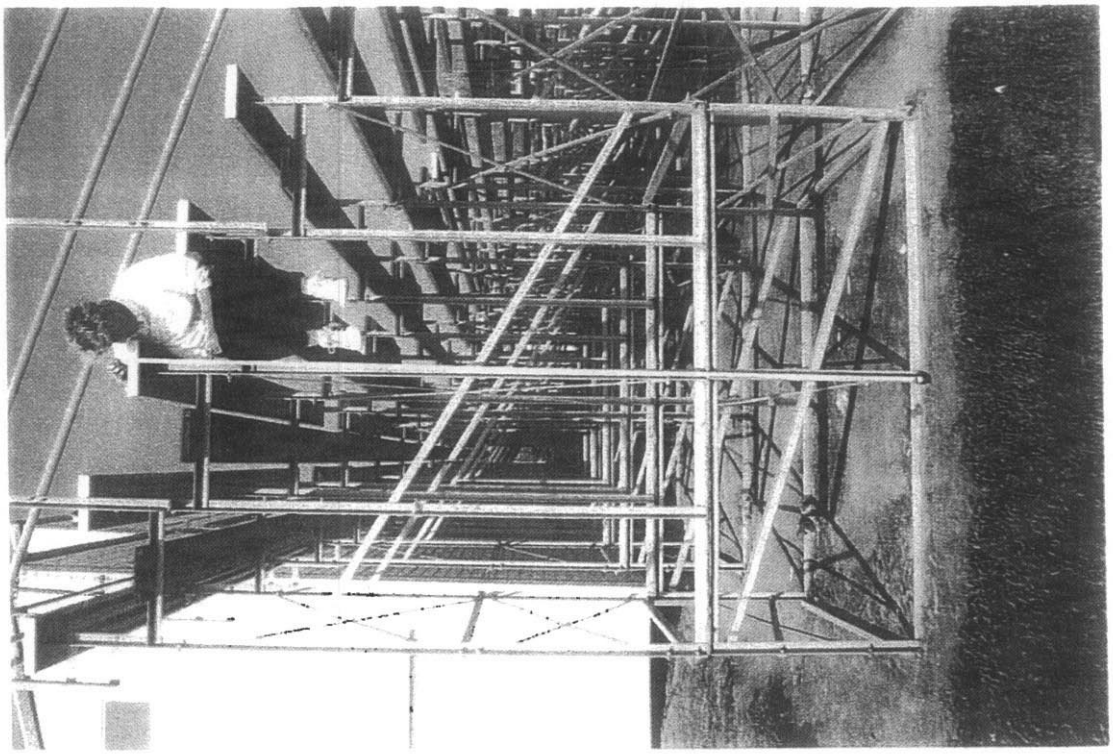
The purpose of the meeting was to go over the plans and specificatio of the proposed additions to the new high school with the architect.

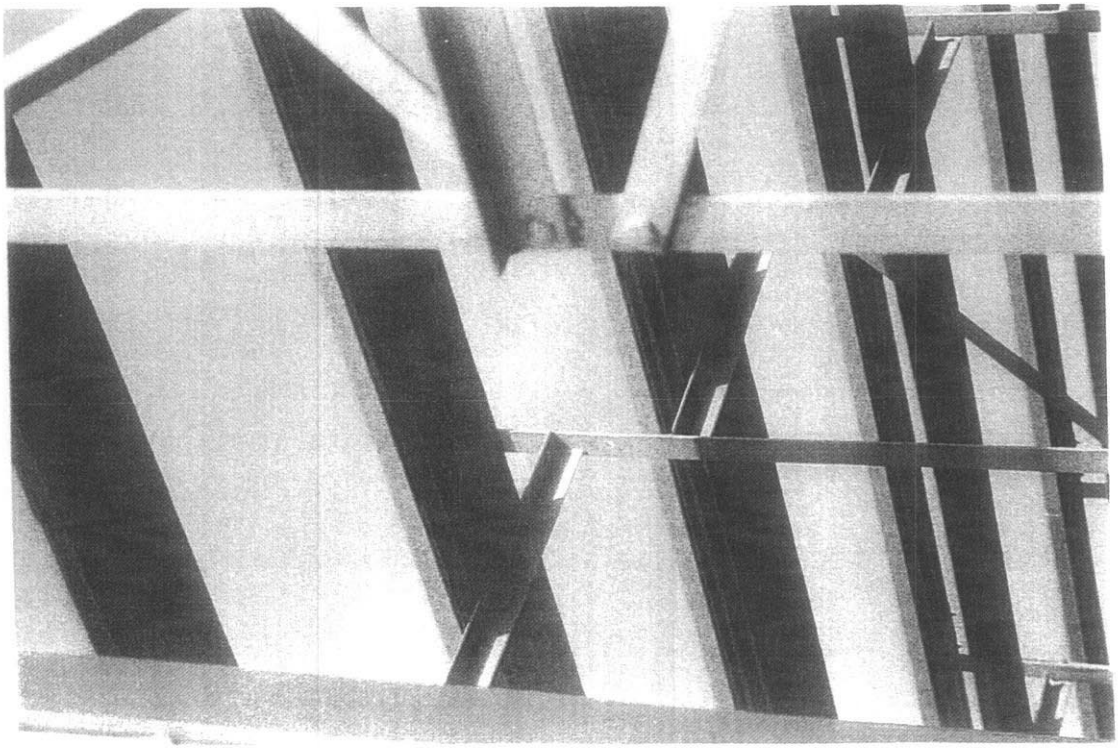
It was moved by Siegenthaler and seconded by Dr. Olson that we approve the plans and specifications for the additions to new high school, with

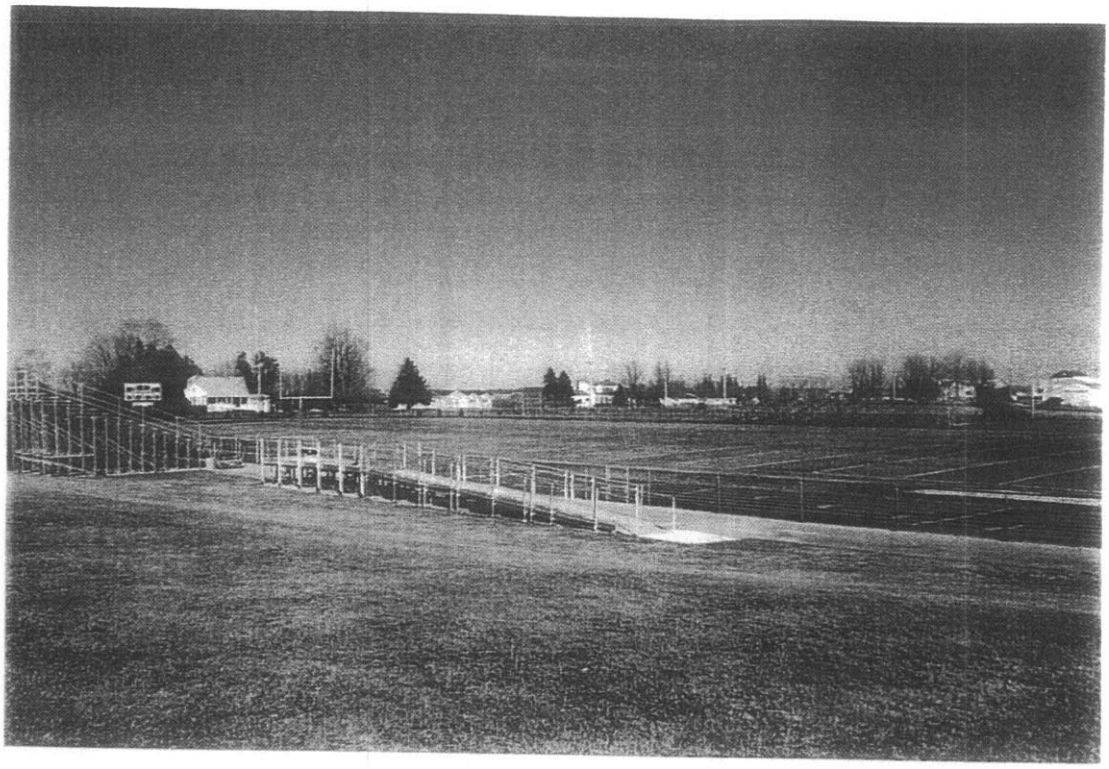
EXHIBIT C

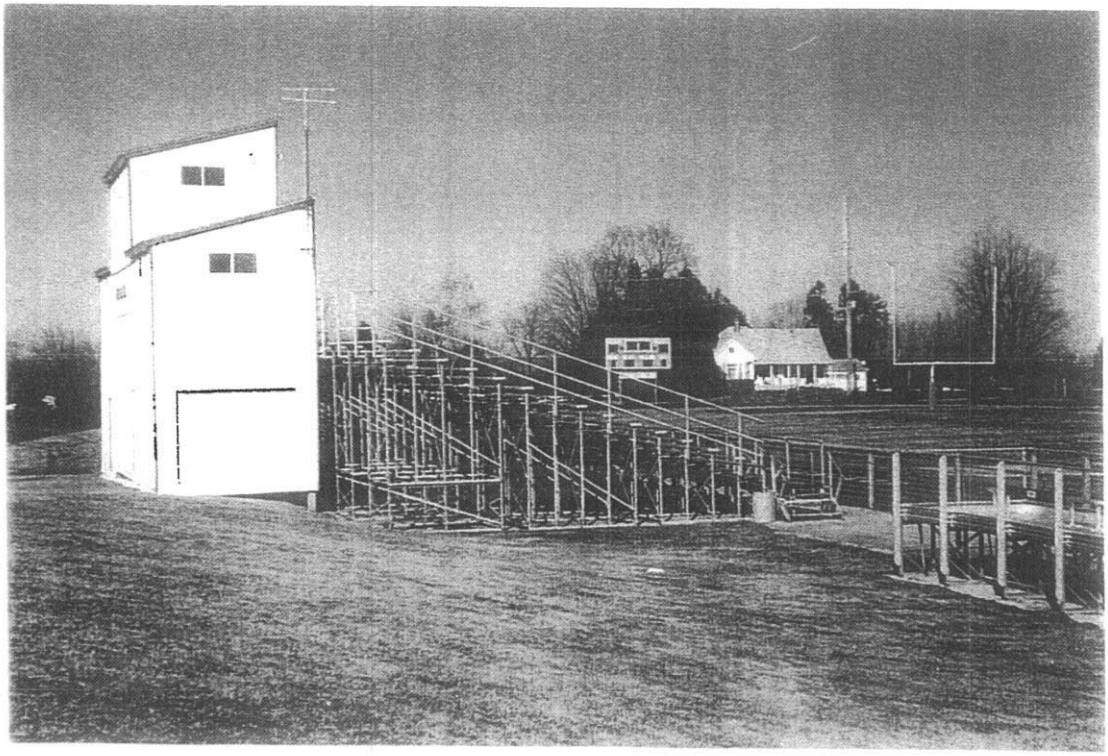


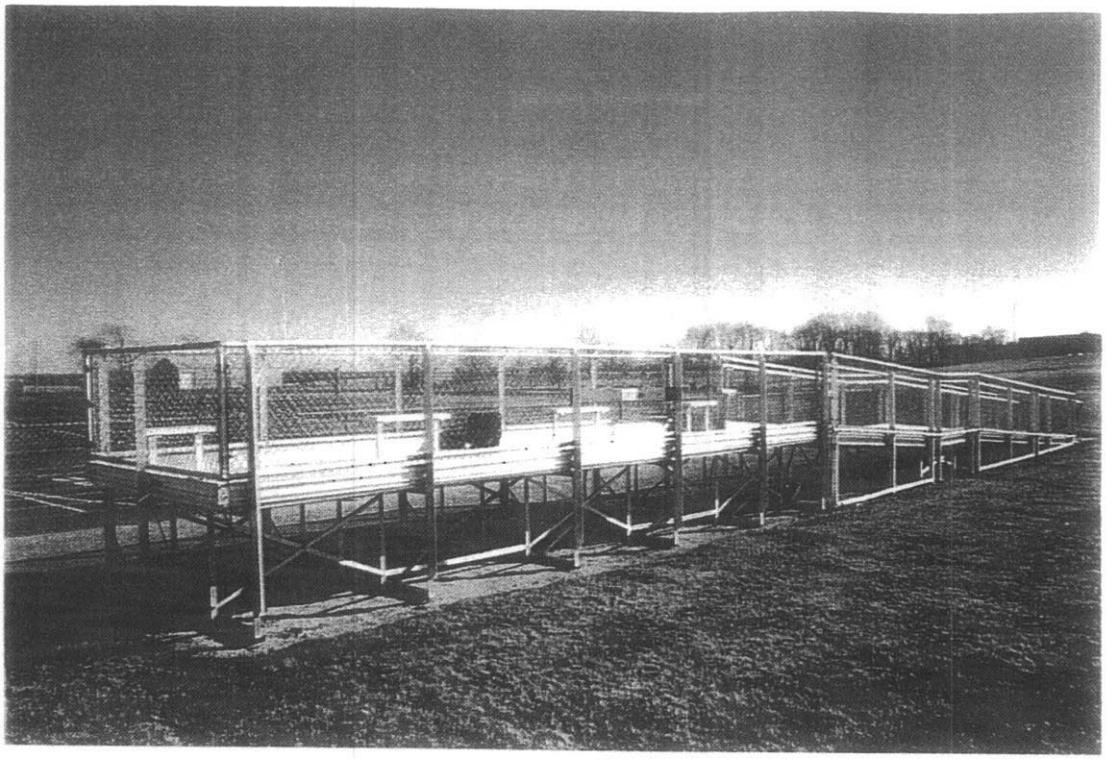


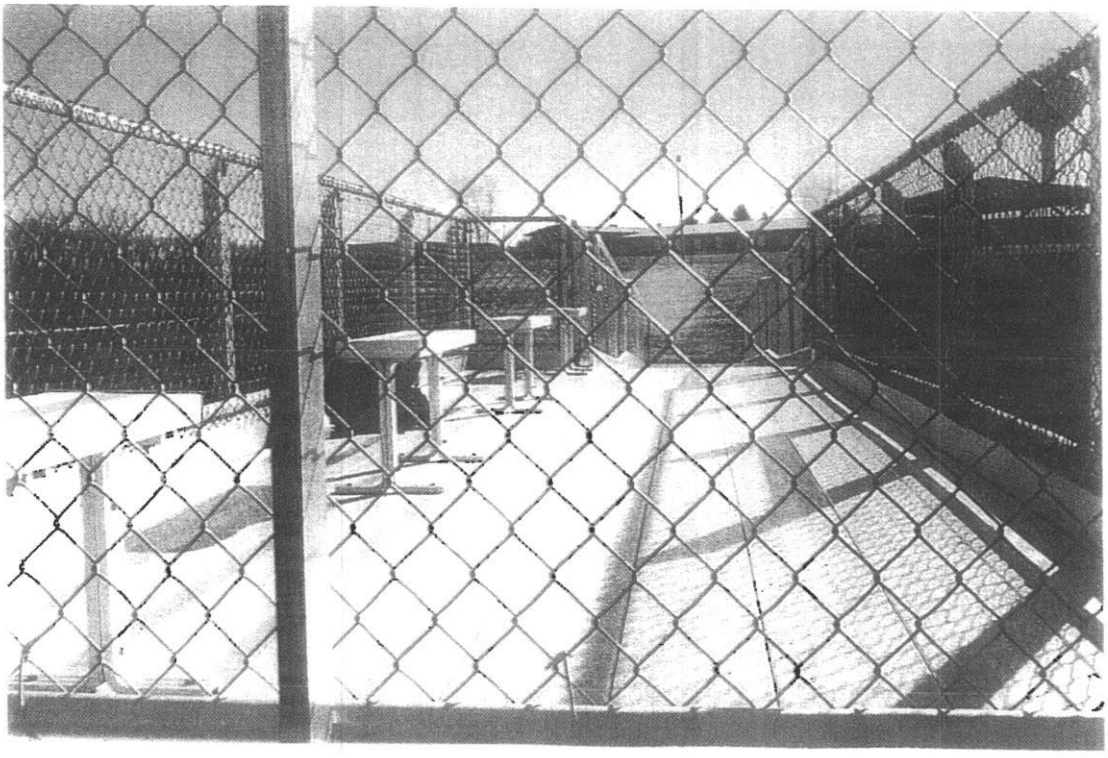


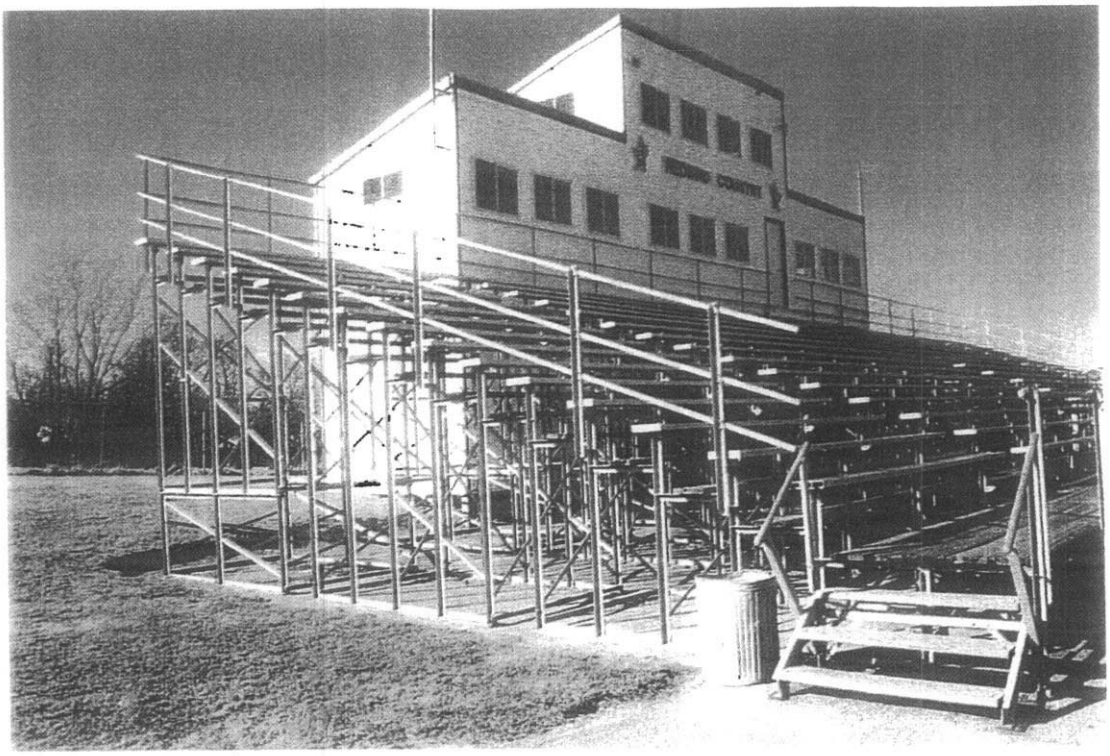


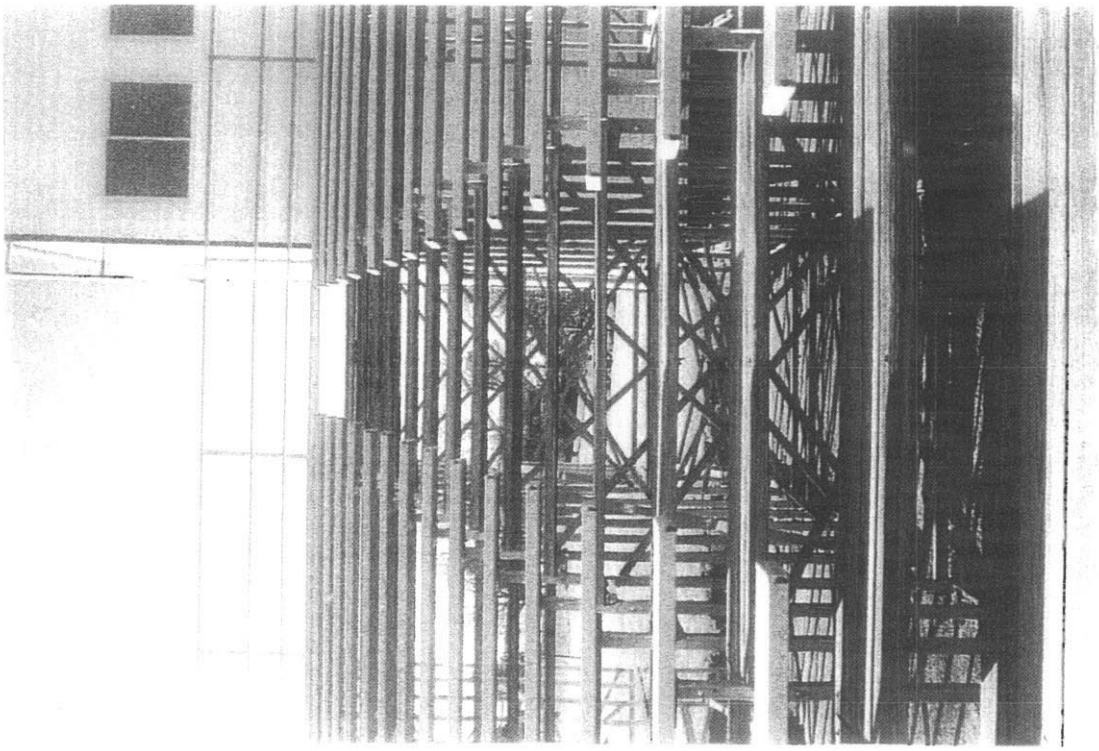


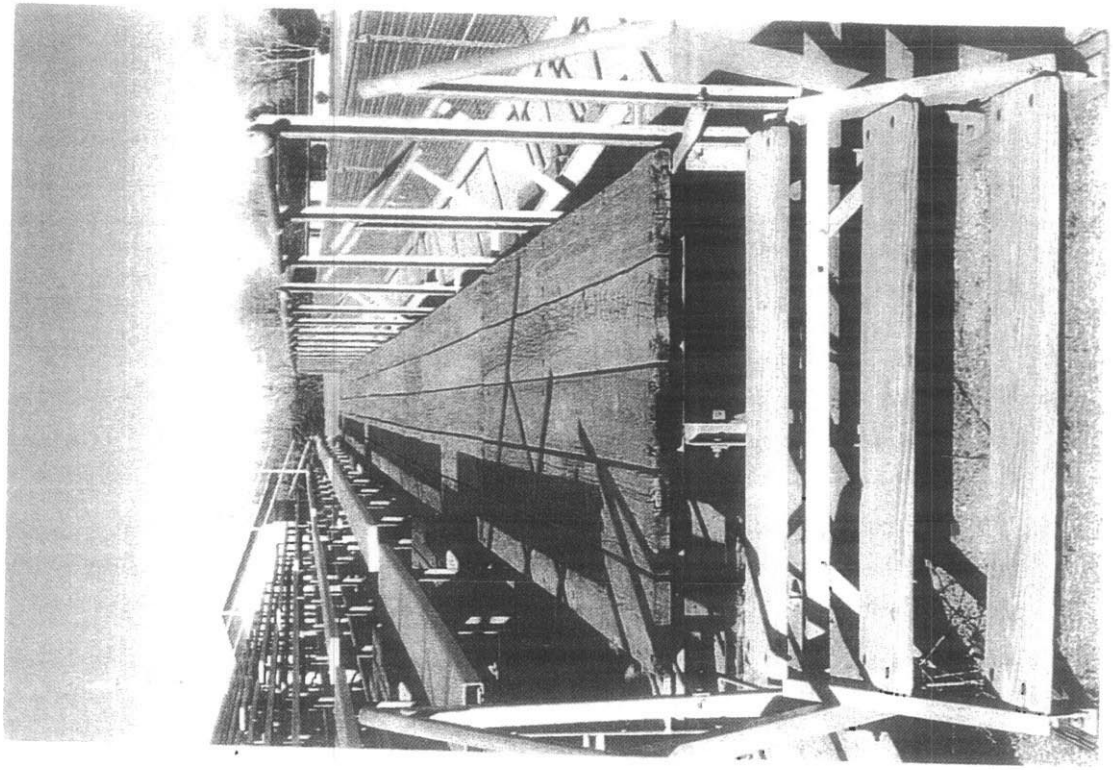


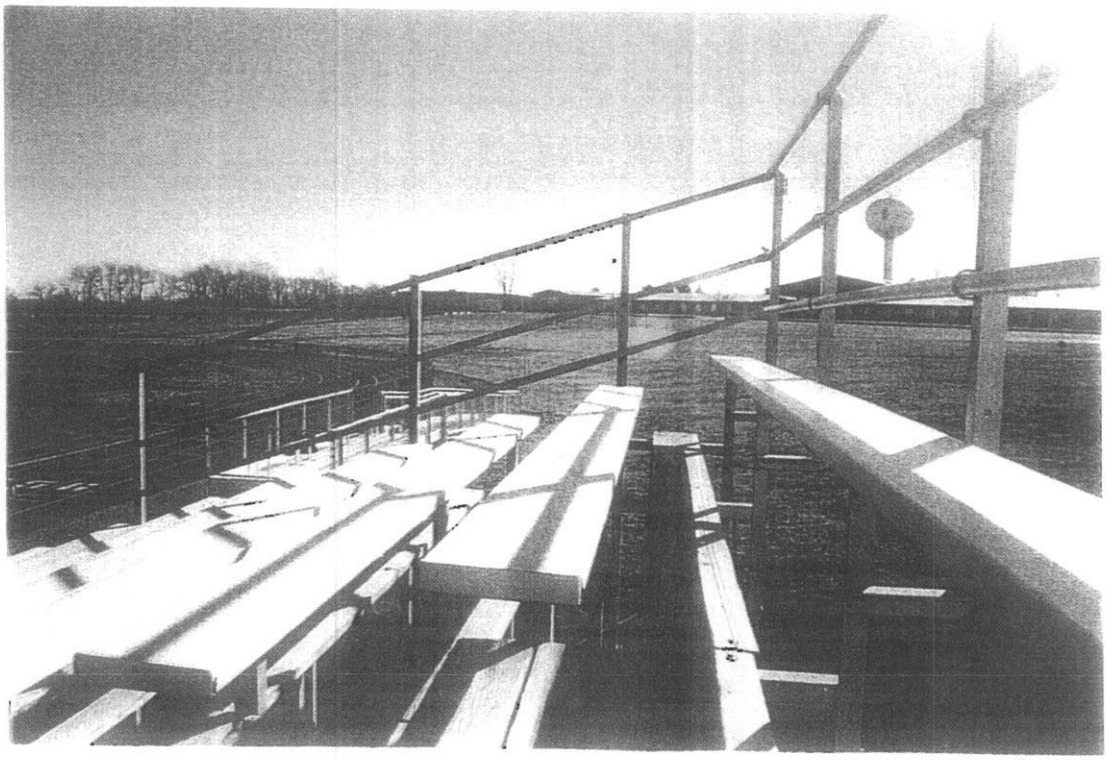


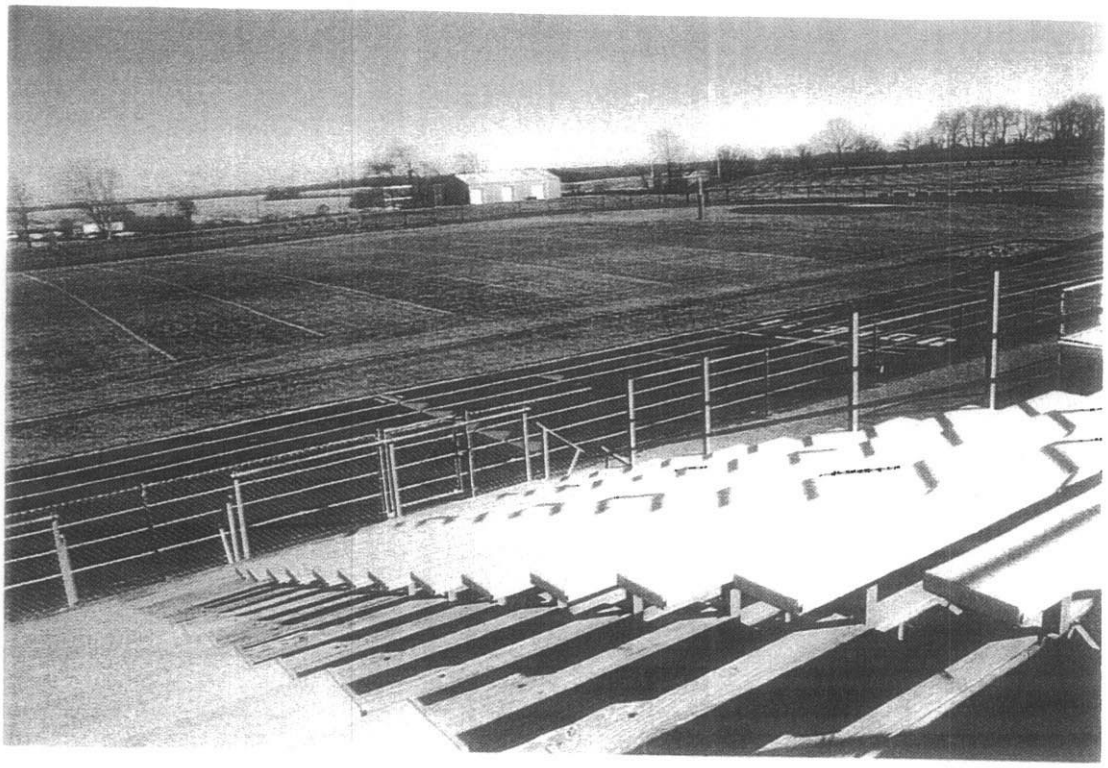


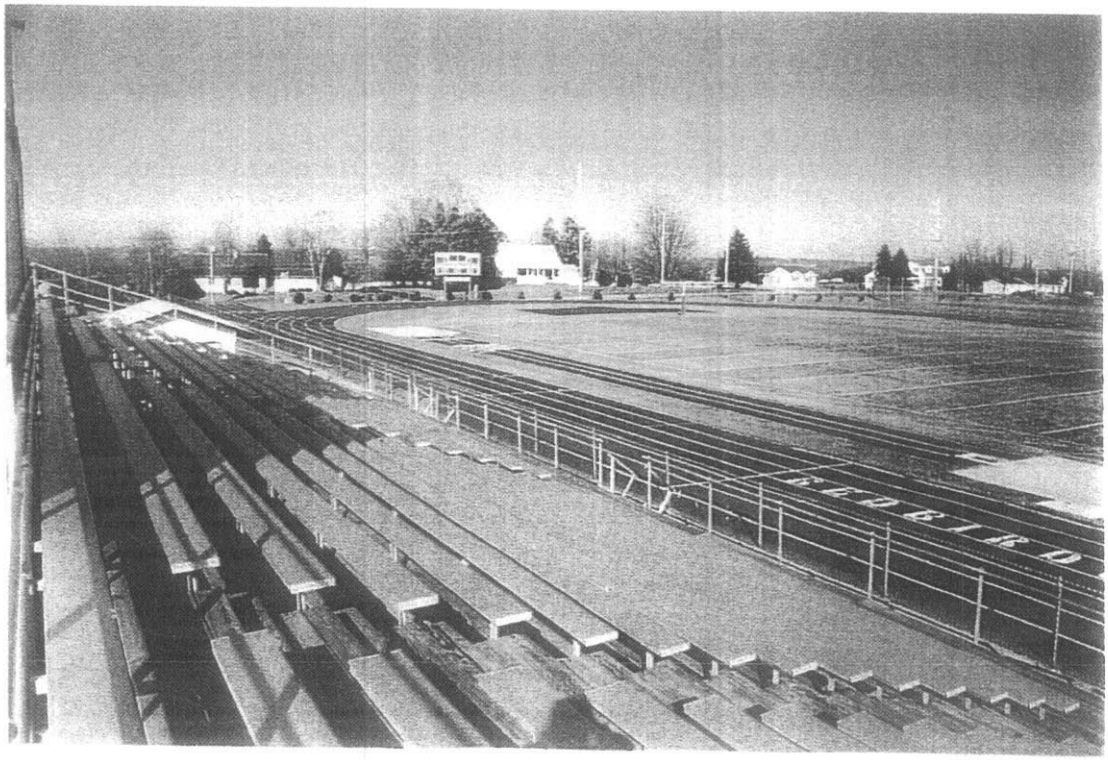


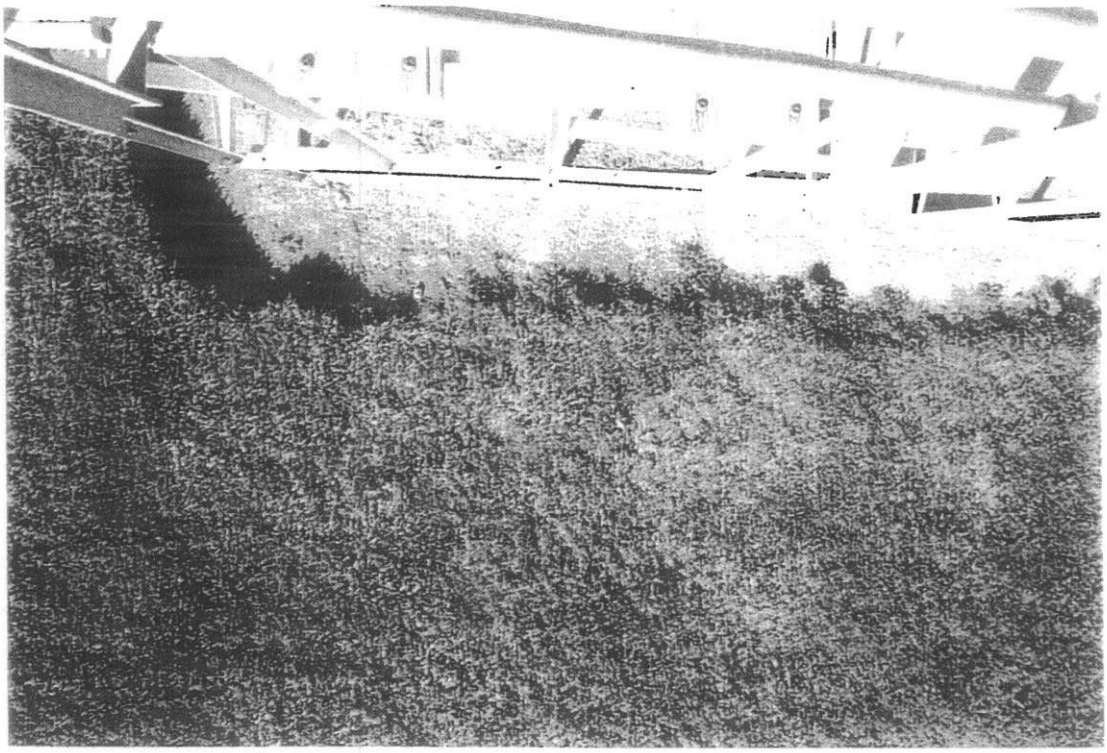


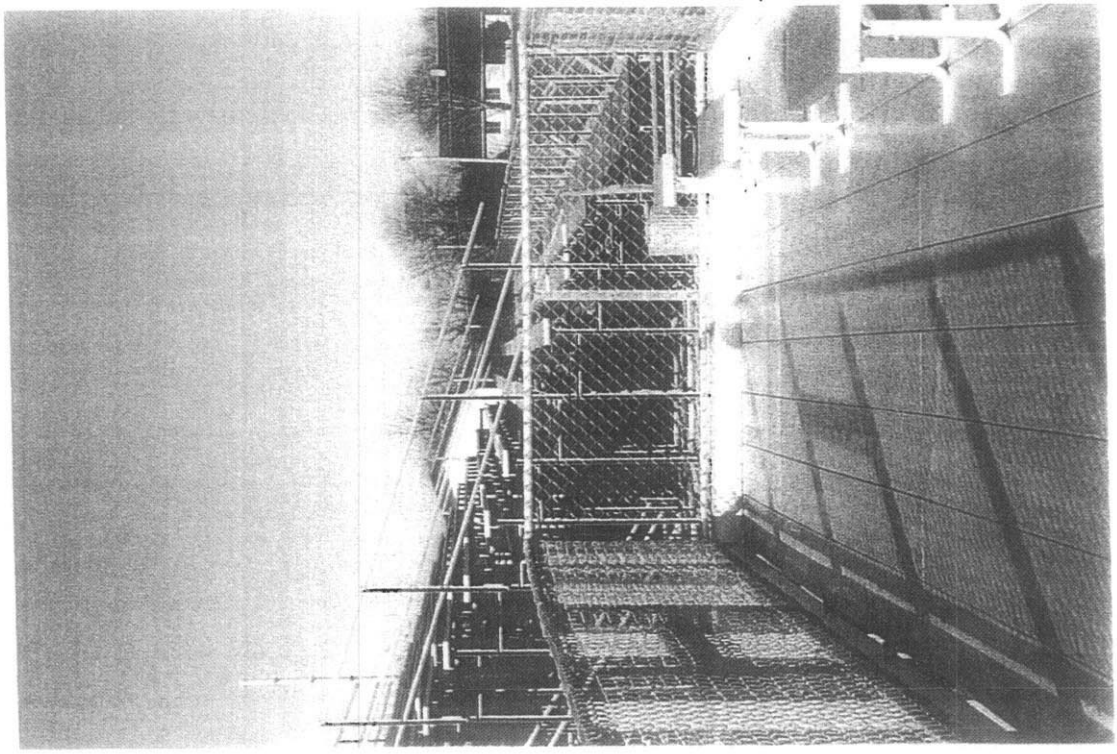


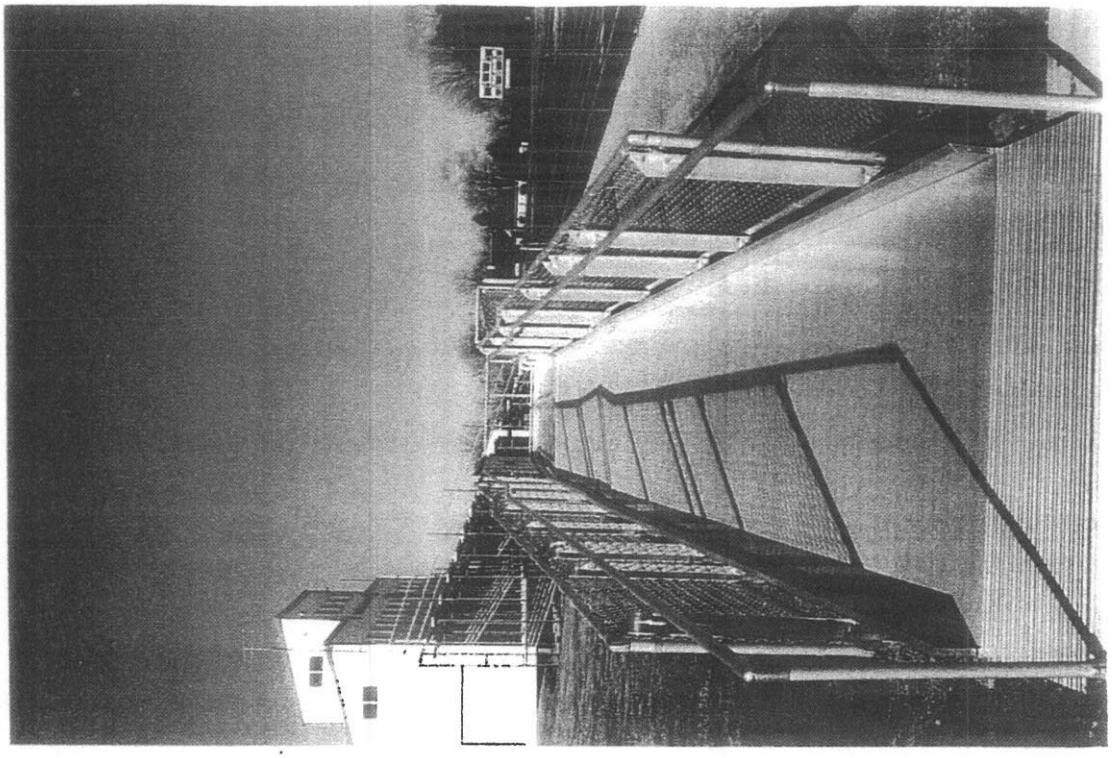


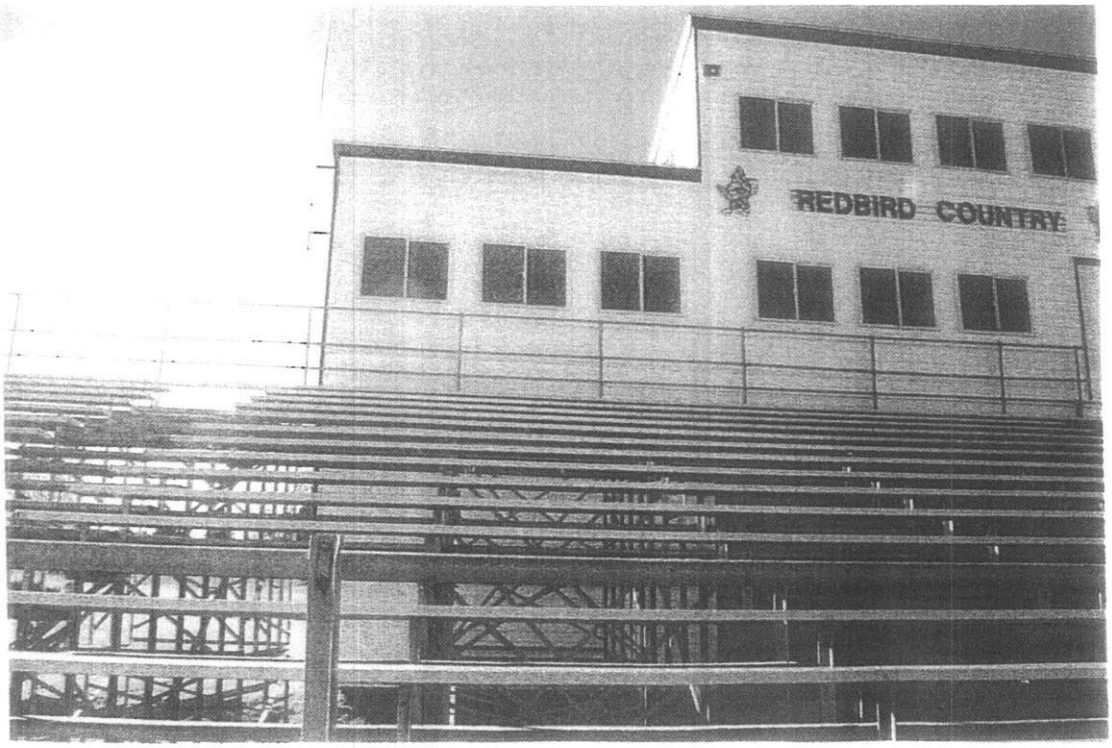








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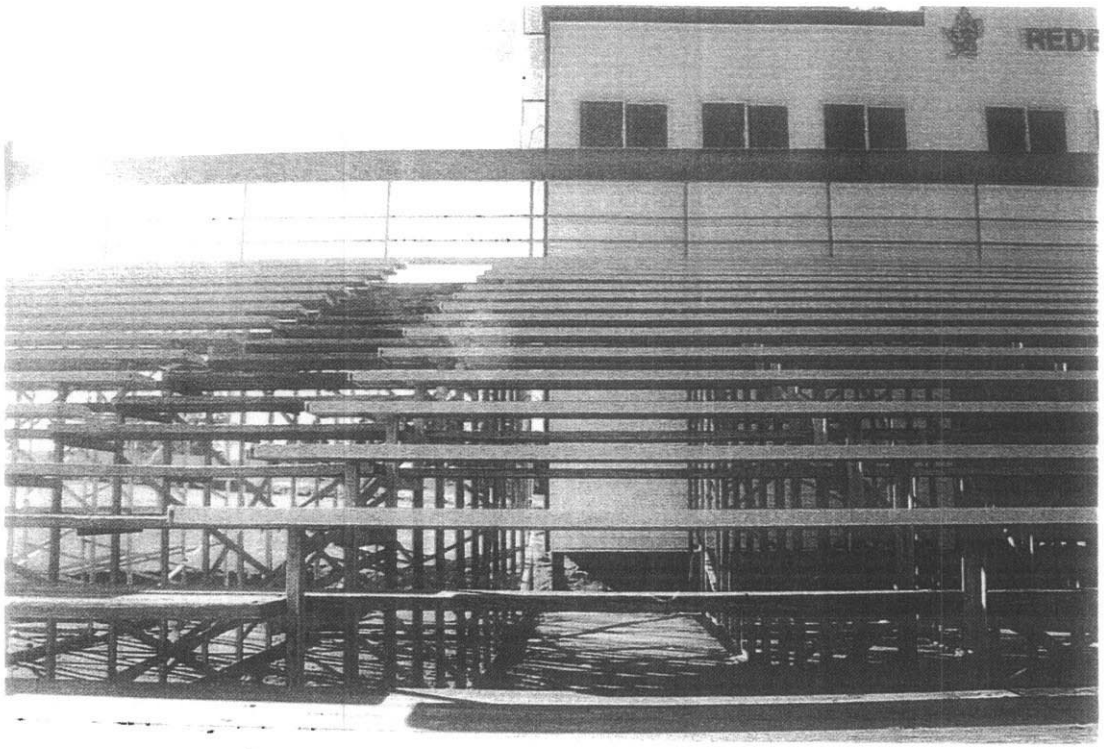

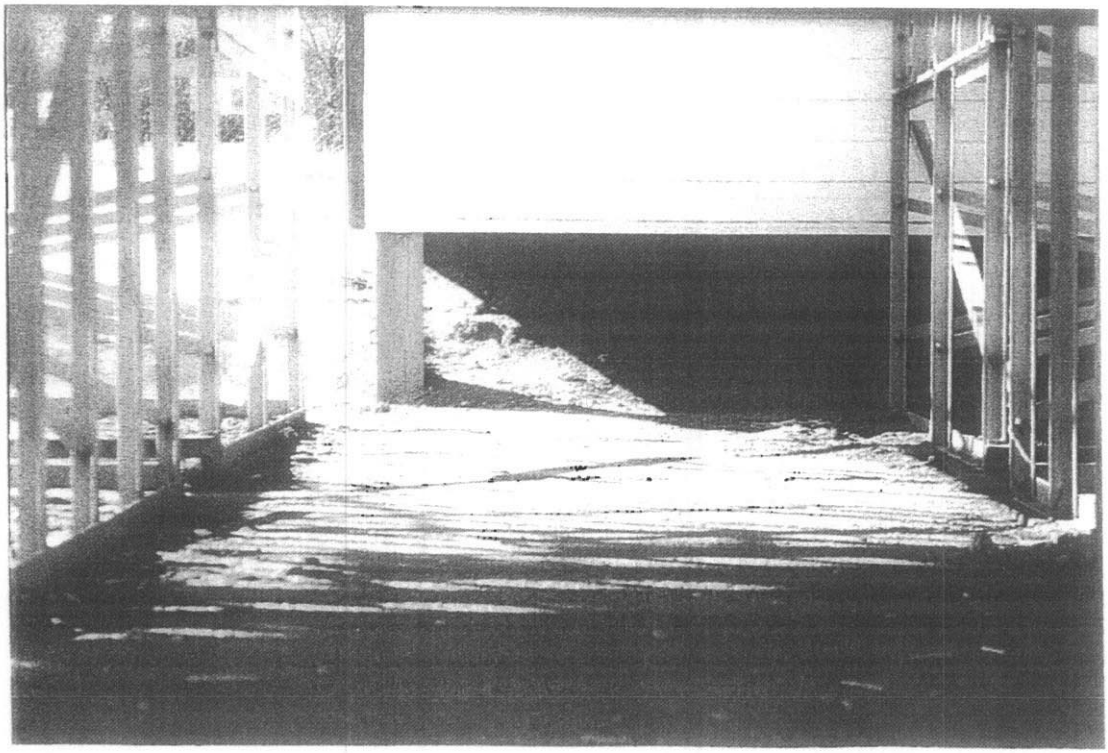

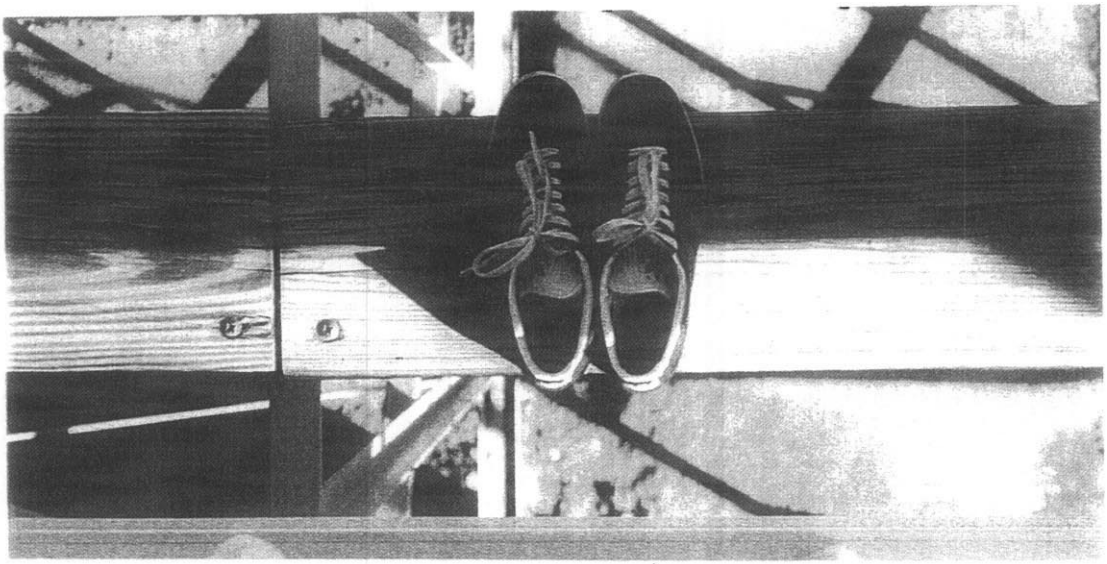

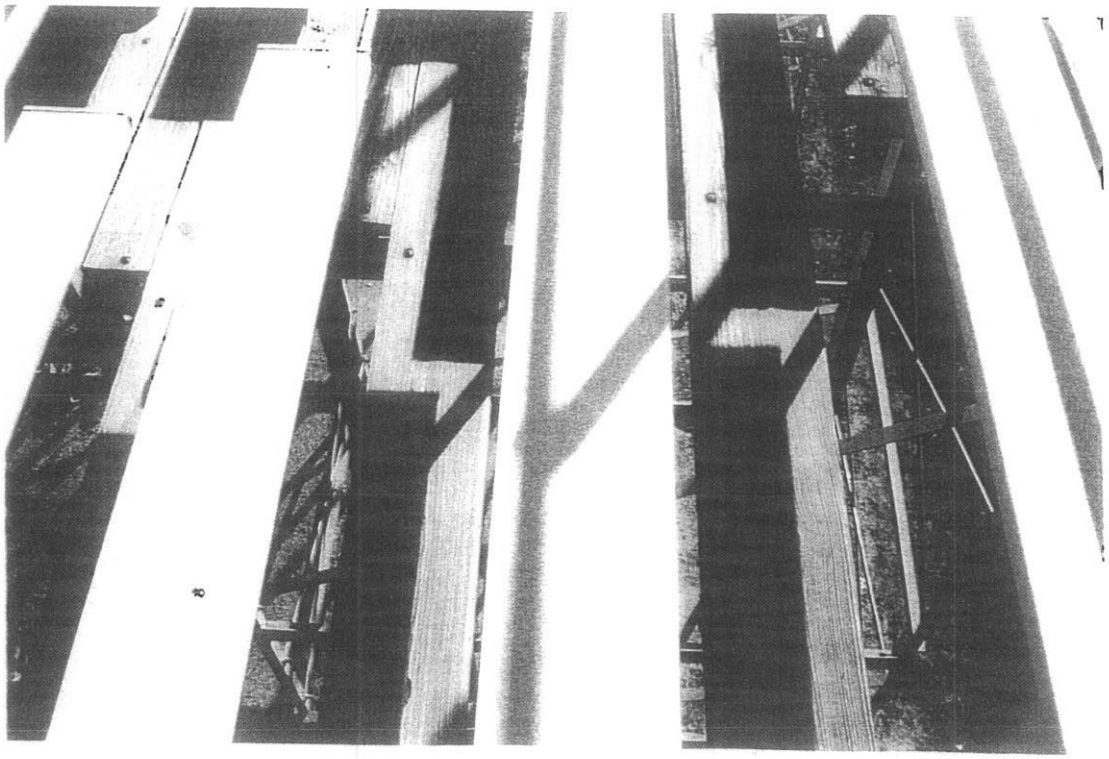

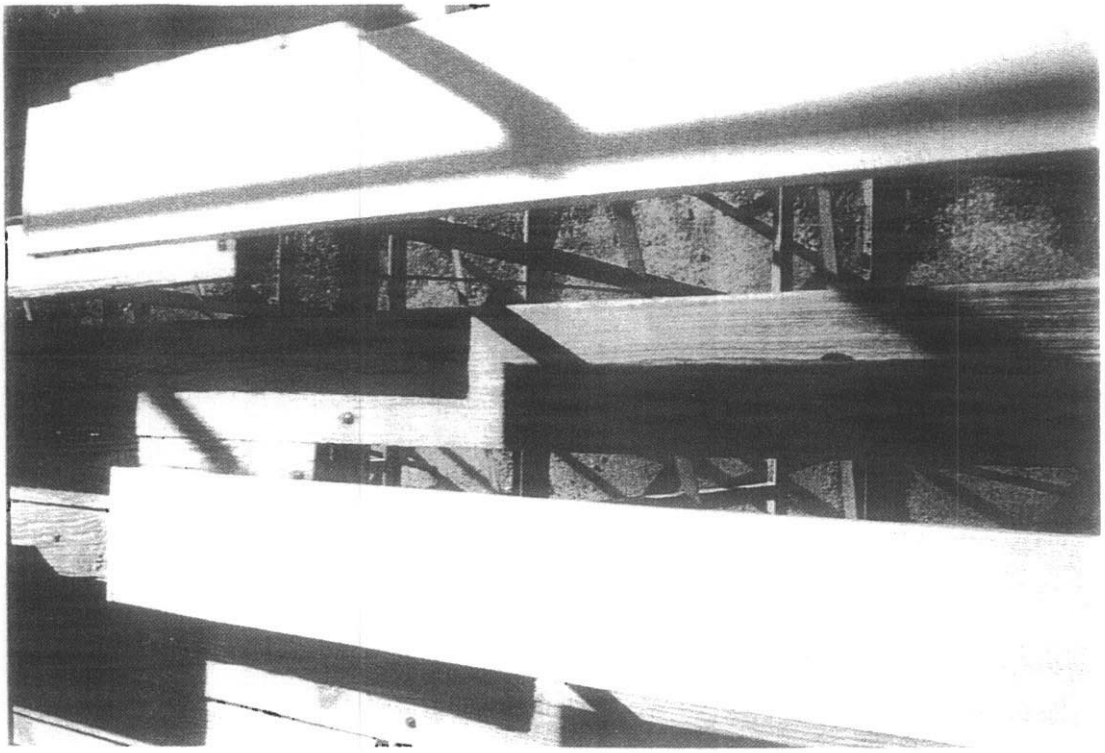

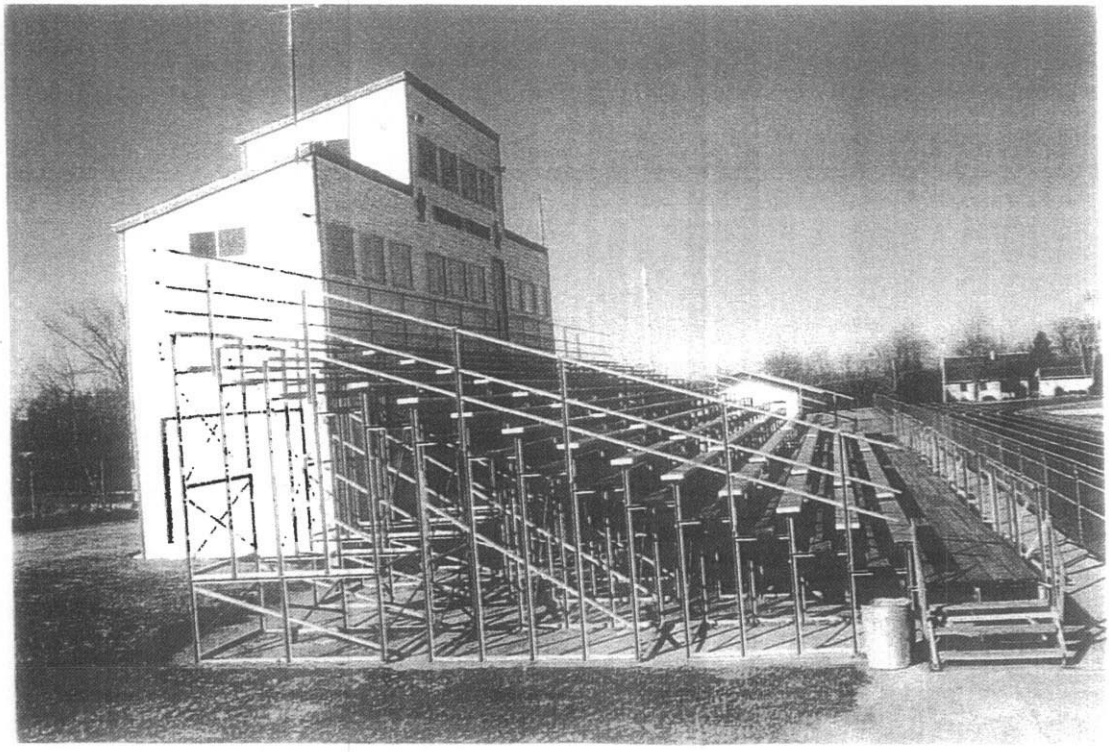

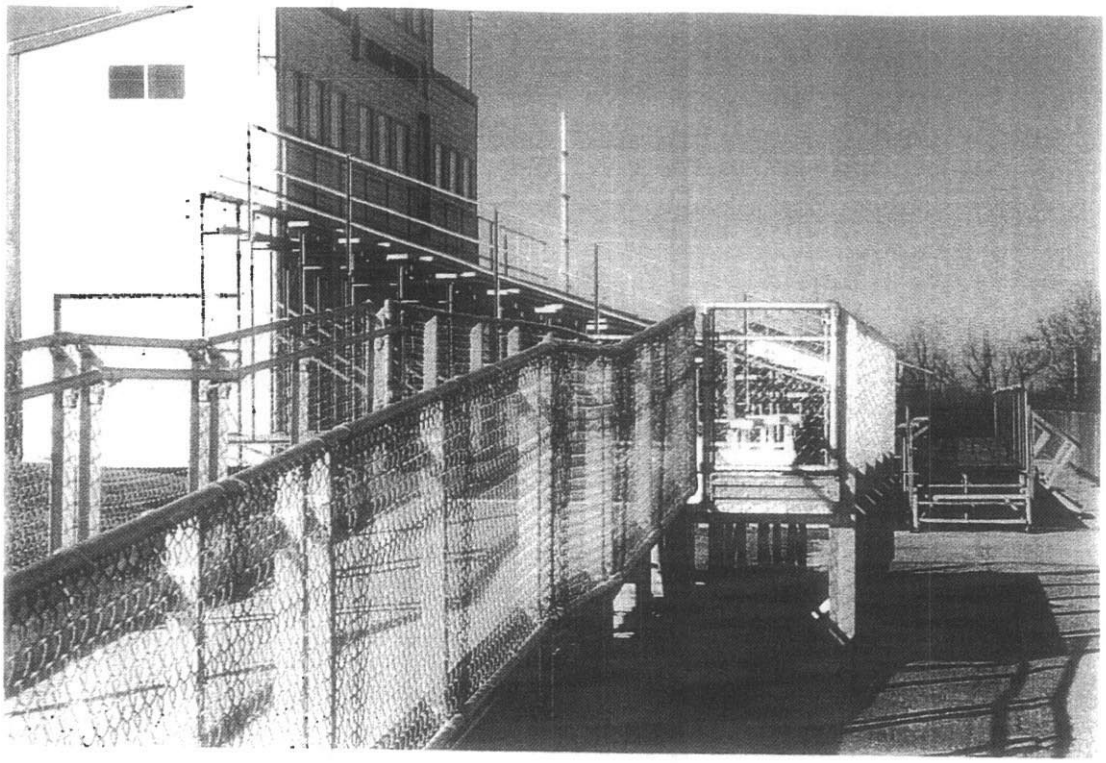

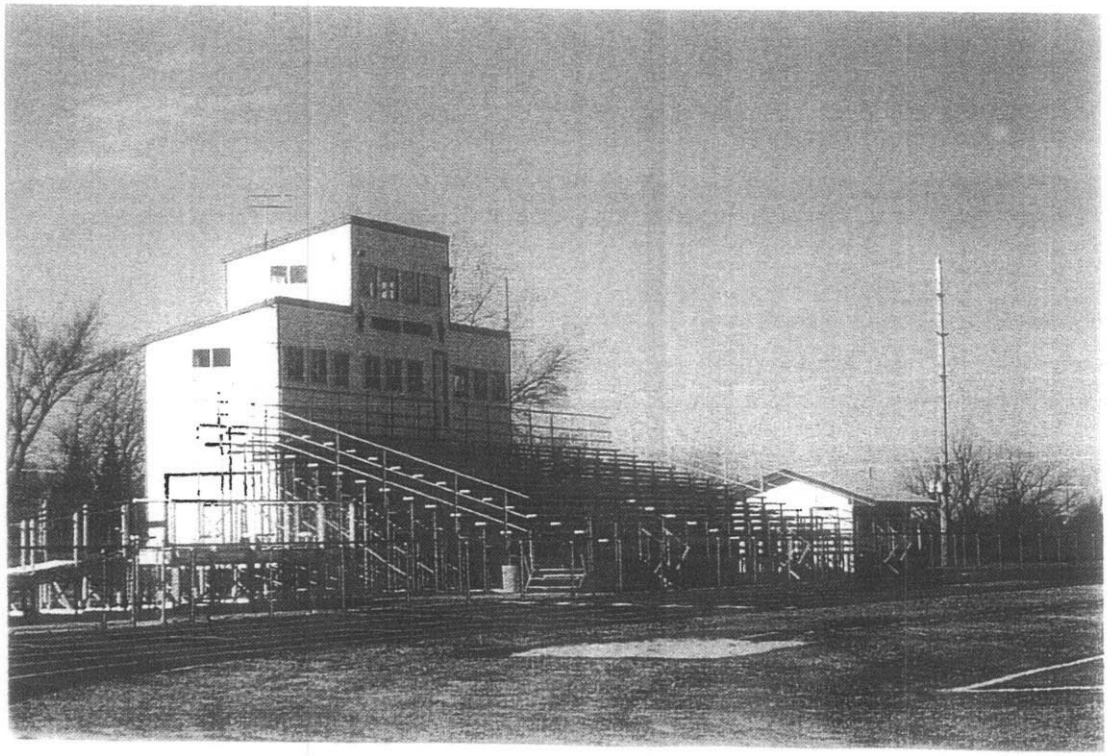

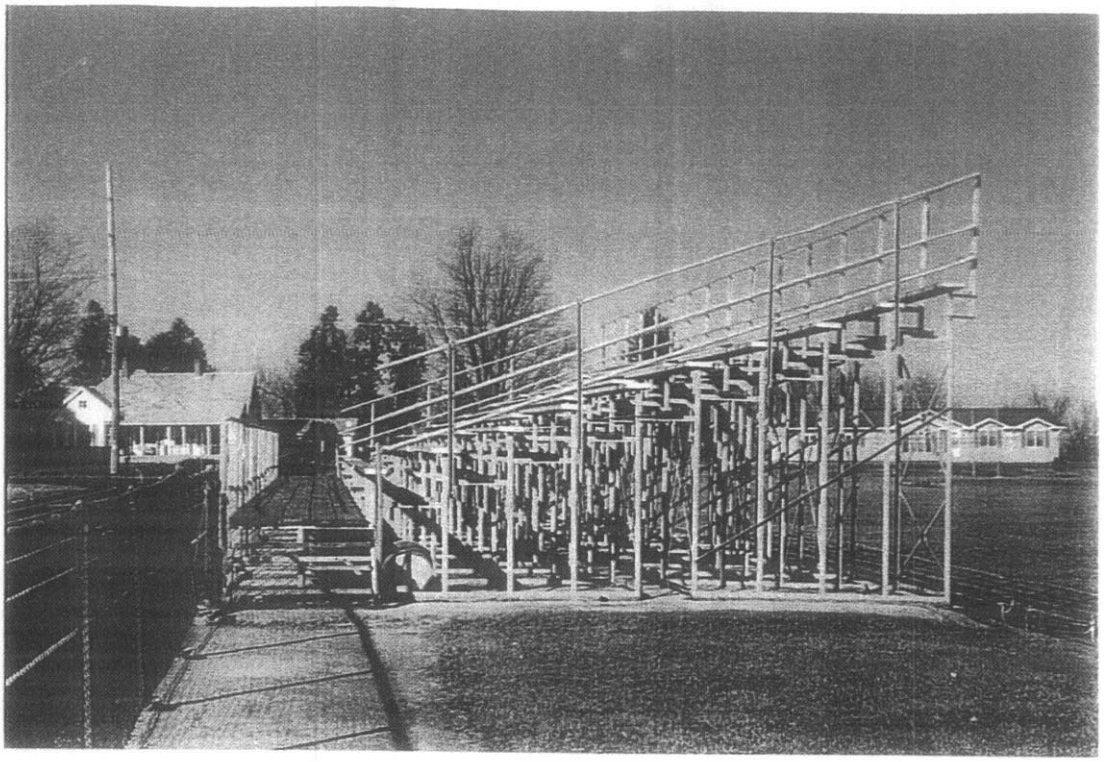

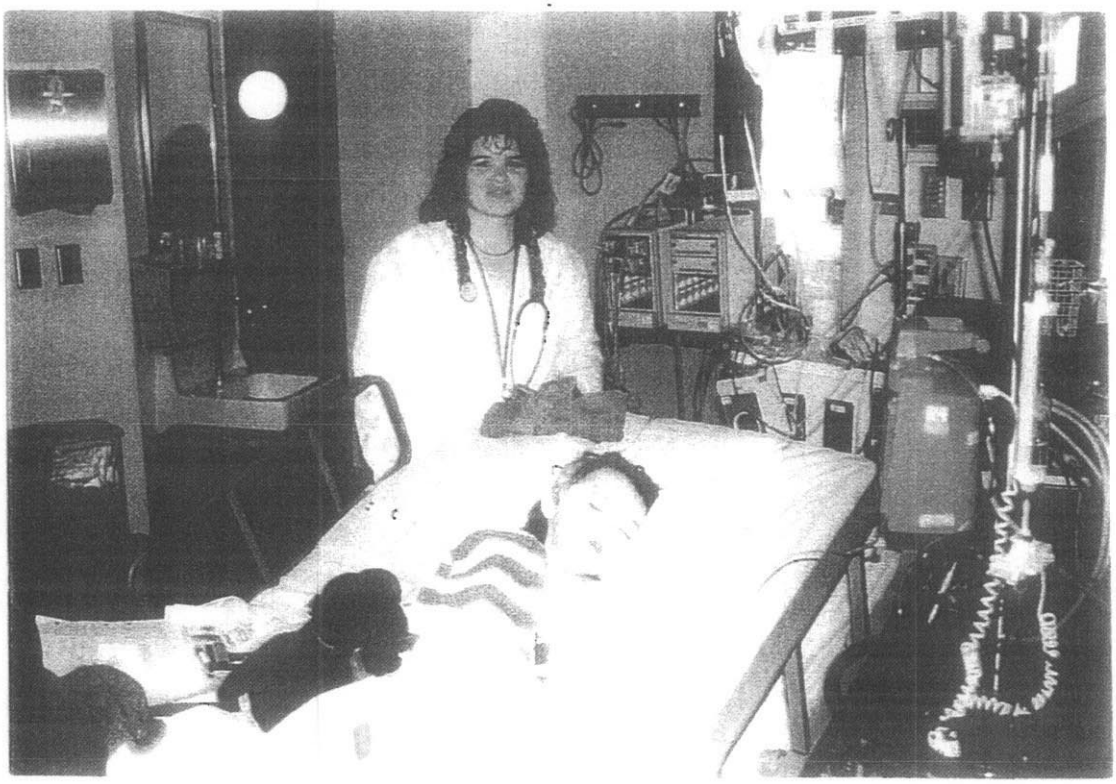

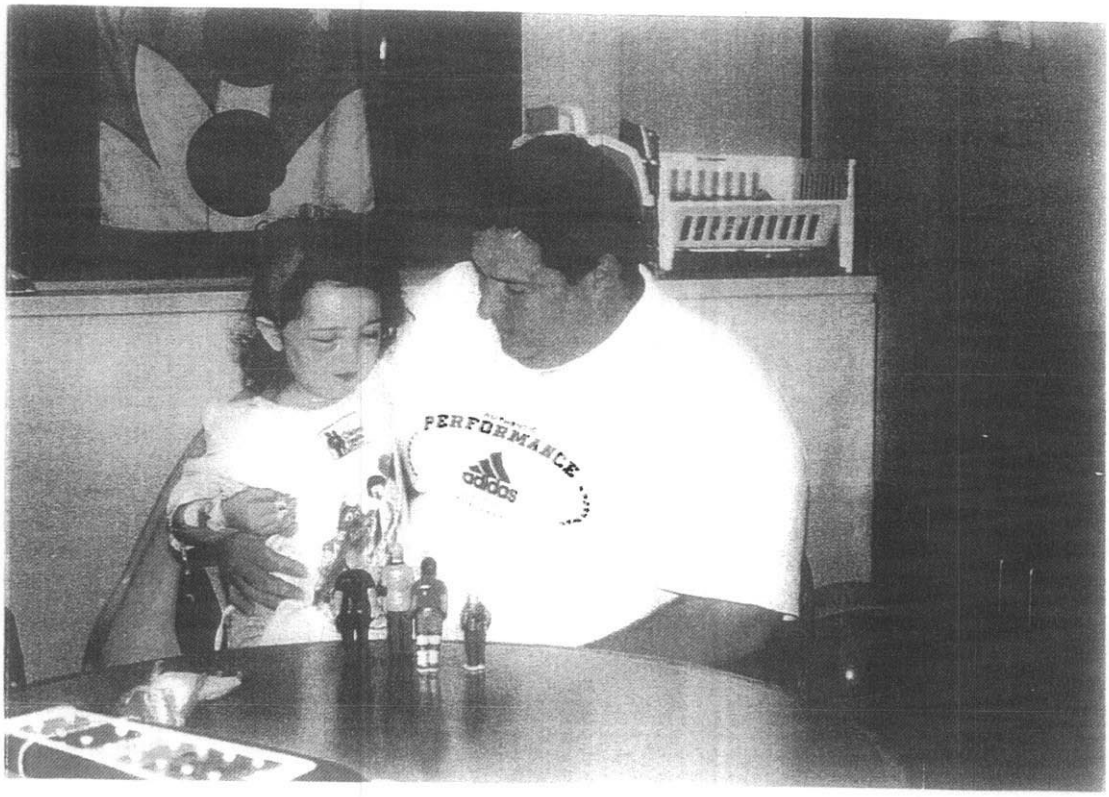
PERFORMANCE
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STATE OF WISCONSIN CIRCUIT COURT LAFAYETTE COUNTY

ELAINE MARIE KOHN, a minor child,
by her parents and natural guardians,
Ronnie A. Kohn, individually, and Lori K. Kohn;
RONNIE A. KOHN, individually; LORI K. KOHN,
individually; and PHYSICIANS PLUS INSURANCE
CORPORATION, a Wisconsin corporation,

Plaintiffs,

v. Case No. 01 CV 048

DARLINGTON COMMUNITY SCHOOLS,
a political corporation and body politic, and
EMC INSURANCE COMPANY, a foreign
insurance corporation, and
STANDARD STEEL INDUSTRIES, INC.,
a foreign corporation, and
MEDALIST INDUSTRIES, INC., a Wisconsin
corporation, and
ILLINOIS TOOL WORKS, INC., a foreign
corporation,

Defendants.

**BRIEF IN SUPPORT OF MOTION
IN OPPOSITION TO SUMMARY JUDGMENT**

The Plaintiffs, Elaine Kohn, a minor child individually and by her parents, Ron and Lori Kohn, by their attorneys, Shneidman Hawks & Ehlke, S.C., file this Brief in opposition to the motion for summary judgment filed by Defendant Illinois Tool Works, Inc. on August 2, 2002. The basis for the Plaintiff's position is as follows.

I. **Section 893.89 of the Wisconsin Statutes does not apply to the case at bar.**

The purpose of summary judgment is to avoid trial when there are no genuine issues of material fact to be tried. *Matter of Estate of Martz*, 171 Wis.2d 89, 491 N.W.2d 772 (Ct. App. 1992). The power of the court in summary judgment proceedings is drastic and should be exercised only when it is plain there is no substantial issue of fact, or permissible inference from undisputed facts, to be tried. *Zepczyk v. Nelson*, 35 Wis.2d 140, 150 N.W.2d 413 (1967). Summary judgment is therefore granted only in unusual circumstances. *Schnabl v. Ford Motor Co.*, 54 Wis.2d 345, 195 N.W.2d 602 (1972). The defendant is not entitled to summary judgment unless the facts conclusively show that the plaintiff's action as no merit. *Fjeseth v. New York Life Ins. Co.*, 14 Wis.2d 230, 111 N.W.2d 85 (1961). Any doubt as to the existence of a genuine issue of material fact is resolved against the party moving for summary judgment. *Park Bancorporation, Inc. v. Sletteland*, 182 Wis.2d 131, 513 N.W.2d 609 (Ct. App. 1994). Even if there is no dispute as to material facts, the court should not grant summary judgment where more than one reasonable inference can be drawn from undisputed facts. *Delmore v. American Family Mut. Ins. Co.*, 118 Wis.2d 510, 516, 348 N.W.2d 151, 154 (1984). For the reasons articulated below, the Defendant Illinois Tool Works, Inc. is not entitled to summary judgment under the facts and circumstances of this case.

A. The cause of action against the Defendant Illinois Tool Works, Inc. is a product liability claim, not a claim for improvement to real property.

The cause of action against the Defendant Illinois Tool Works, Inc. is that it is liable for the Plaintiffs' injuries that resulted from Plaintiff Elaine Kohn's fall from the bleachers at the Darlington high school according to the doctrine of strict products liability. Plaintiffs' Amended Complaint, ¶¶ 27-28. Illinois Tool Works, Inc.'s predecessor, Standard Steel Industries, Inc., sold the bleachers to the Darlington Community Schools on June 13, 1969. Defendant

Darlington Community Schools' Responses to Illinois Tool Works' First Set of Written Interrogatories, at ¶ 9; Exhibit B. The Plaintiffs' injuries arise from the defective bleacher product, and the cause of action against the Defendant Illinois Tool Works, Inc. accordingly is based on the construction of a dangerously defective product on the site of the Defendant Darlington Community Schools. The circumstances of the Plaintiff's cause of action against the Defendant Illinois Tool Works, Inc., as well as the remedy requested, arise out of and are governed by the law of products liability as a physically injured user of an unreasonably dangerous product, as was recognized by the Wisconsin Supreme Court in *Dippel V. Sciano*, 37 Wis.2d 443, 463, 155 N.W.2d 55 (1967). There, the Court wrote "[w]hen the manufacturer or the seller offers a product for sale which he expects to be used by the consuming public within its intended use and such product is defective and injures the consumer, his liability in tort can be based upon a breach of duty quite apart from contractual obligations." *Id.* at 458, 155 N.W.2d 55. Because the allegations against the Defendant Illinois Tool Works, Inc. are vested in a defective product that caused personal injuries to the Plaintiffs as members of the consuming public within the bleachers' intended use, the cause of action against Illinois Tool Works is a product liability claim.

The case law relied upon by Illinois Tool Works, Inc. in its Memorandum of Law in support of its motion for summary judgment, is inapposite to the facts and circumstances of the instant case. The Defendant Illinois Tool Works, Inc. cites two cases for the application of § 893.89, *Kallas Millwork Corp. v. Square D. Co*, 66 Wis.2d 382, 225 N.W.2d 454 (1975) and *United States Fire Ins. Co. v. E.D. Wesley Co.*, 105 Wis.2d 305, 313 N.W.2d 833 (1982). Both cases are readily distinguishable from the case at bar. In *Kallas*, the plaintiffs sued after a water line installed by another company, ITT Grinnell Corp. at the direction of Square D between 1945

and 1952, ruptured and damaged the adjacent property of Kallas Millwork Corporation in 1968. The Supreme Court held that the high pressure water line intended as a fire protection system was an improvement to real property under §893.155 (the predecessor to § 893.89), but that the statute contained an unconstitutional distinction that is not relevant to the case at bar. The reliance of Illinois Tool Works, Inc. on the *Wesley* case is also misplaced. There, the plaintiffs sued for damages when an underground pipeline installed by the defendants in 1953 burst in 1978 resulting in an oil spill in Two Rivers, Wisconsin. As in *Kallas*, the Wisconsin Supreme Court held that the pipeline became an improvement to real property pursuant to § 893.155 when it was connected to U.S. Oil's real property. Both *Kallas* and *Wesley* are inapplicable because they involve different types of parties, causes of action, and affected interests. *Kallas* and *Wesley* concerned the installation of a water line and a pipe line, respectively, to commercial real estate. In neither case did the plaintiff allege a products liability claim involving a defective product that caused harm to a member of the consuming public. Rather, in both decisions the parties were corporate entities whose real estate interests were harmed by a burst pipe or oil line. The installed pipe in each case was defined as an "improvement to real property" that literally required the excavation and installation of a pipe in the ground and that reduced the value of the surrounding real estate when it burst. Unlike the situation of Elaine Kohn, who was injured at the Darlington homecoming game in the presence of other public spectators, none of the parties in either *Kallas* or *Wesley* expected or invited members of the public to be exposed to the pipe lines at issue; rather, the bleacher products provided by Illinois Tool Works' predecessor corporation were constructed with the expectation that the public would be exposed to them, and were a product specifically designed to provide seating at the school's sporting events. The harm that Elaine Kohn suffered as a result of the dangerous condition of the bleachers did not affect her

real estate, but rather her four and one-half year old body. Therefore, the Defendant Illinois Tool Works' attempt to liken the bleachers in the instant case to bursting water or oil lines, while creative, is simply not persuasive.

B. The appropriate statute of limitations is § 893.54 of the Wisconsin Statutes, requiring that the action be commenced within three years of the date of injury, and the instant action was timely filed.

An action to recover damages for injuries to the person must be commenced within three years of the accrual of the claim. § 893.54, Wis. Stats. A cause of action accrues when there exists a claim capable of present enforcement, a suable party against whom it may be enforced, and a party who has a present right to enforce it. *Hunter v. School District of Gale-Ettrick*, 293 N.W.2d 515, 519, 97 Wis.2d 435 (1980) (citing *Holifield v. Setco Industries, Inc.*, 42 Wis.2d 750, 160 N.W.2d 77 (1969)). The three year statute of limitations begins to run on the date of the plaintiff's injury, which "sets in force and operation the factors that create and establish the basis for a claim for damages." *Id.* at 519, 97 Wis.2d 435. In the case at bar, the Plaintiffs filed their original complaint on August 15, 2001 and their amended complaint on April 15, 2002, for personal injuries sustained on September 29, 2000, well within the applicable statute of limitation for their claims. The instant case, therefore, was timely filed.

II. Application of § 893.89, Stats. to the case at bar would create an absurd result that is inconsistent with applicable principles of statutory construction.

The application of § 893.89 in the manner suggested by the Defendant Illinois Tool Works, Inc. to include the defective bleacher product in the case at bar within the generic definition of an "improvement to real estate", and to apply an inappropriate statute of limitation for ten years from the substantial completion of the bleachers, would create an absurd result that is incompatible with fundamental doctrine with respect to statutory construction. In the view of Illinois Tool Works, Inc., it is appropriate to impose a clearly inapplicable statute regarding an

improvement to real estate to a defective product that caused personal injuries. To do so would cause the incongruous result of extinguishing the Plaintiffs' claims before Elaine Kohn was even conceived, let alone born or injured. According to Illinois Tool Works, Elaine Kohn is without a remedy for her damages because she was born too late - outside of the ten year exposure period from the date the bleachers were substantially completed. This result is unfair, unjust, and absurd.

The absurdity of the Defendant's argument is underscored by the fact that the Plaintiffs' claims are most similar to, fall squarely within, and were brought within, the three year statute of limitations for personal injuries provided in § 893.54. The Court is to apply the statute of limitations that most directly relates to the claim or cause of action. In choosing a limitations period for a personal injury claim, the court should apply the statute of limitations that the legislature intended for the particular claim specific to the allegations. In applying statutes, the court must reject unreasonable or absurd interpretations that would result. *State v. West*, 181 Wis.2d 792, 512 N.W.2d 207 (Ct.App. 1993); *In Re Village of Powers Lake*, 171 Wis.2d 59, 492 N.W.2d 342 (Ct.App. 1992). The Plaintiffs reject the position of Illinois Tool Works, Inc. that § 893.89 has any relationship to the facts of this case. However, even if it did, the three year statute of limitations period for personal injuries under § 893.54 would apply because it is more specific to the facts of this case. Where two statutes relate to the same subject matter, or rather as is the case here, it is at least *argued* that another statute relates to the subject matter, the more specific statute controls over the general statute. *Gottsacker Real Estate Company, Inc. v. Department of Transportation*, 121 Wis.2d 264, 359 N.W.2d 164 (Ct.App. 1984). The statute of limitations in § 893.54 specifically addresses the Plaintiffs' personal injuries, which arise from strict products liability, and which supersedes the absurd result created by the statute of

limitation cited by the Defendant Illinois Tool Works, Inc. under § 893.89. It is inappropriate to apply a limitations period that is incompatible with the intent of the legislative drafters and the language of the statute at issue. *Felder v. Casey*, 487 U.S. 131 (1988). Based on the foregoing, the Plaintiffs respectfully request this Court to deny the motion of Illinois Tool Works, Inc. for summary judgment.

Dated in Milwaukee, Wisconsin, this 21st day of August, 2002.

Respectfully submitted,

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and LORI K. KOHN, Plaintiffs
By:

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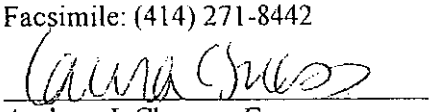

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STATE OF WISCONSIN CIRCUIT COURT LAFAYETTE COUNTY

ELAINE MARIE KOHN, a minor child, by her parents and natural guardians, Ronnie A. Kohn, individually, and Lori K. Kohn; RONNIE A. KOHN, individually; LORI K. KOHN, individually; and PHYSICIANS PLUS INSURANCE CORPORATION, a Wisconsin corporation,

Plaintiffs,

v.

Case No. 01 CV 048

DARLINGTON COMMUNITY SCHOOLS, a political corporation and body politic, and EMC INSURANCE COMPANY, a foreign insurance corporation, and STANDARD STEEL INDUSTRIES, INC., a foreign corporation, and MEDALIST INDUSTRIES, INC., a Wisconsin corporation, and ILLINOIS TOOL WORKS, INC., a foreign corporation,

Defendants.

SUPPLEMENTAL BRIEF IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

The Plaintiffs, Elaine Kohn, a minor child individually and by her parents, Ron and Lori Kohn, by their attorneys, Shneidman Hawks & Ehlke, S.C., file this supplemental Brief at the request of the Honorable William Eich regarding the constitutionality of Section 893.89, Wis. Stats.

A. **Section 893.89, Wis. Stats., Violates The Equal Protection Clause Of The Wisconsin And U.S. Constitution Because No Rational Basis Exists To Exempt Some Groups From Liability While Excluding Other Similarly Situated Groups**

Section 893.89(2), Wis. Stats., provides, in relevant part, that "no cause of action may accrue . . . against the owner or occupier of the property or against any person involved in the improvement to real property . . . for any injury to property, for any injury to the person . . . arising out of any deficiency or defect in the design, land surveying, planning, supervision or observation of construction of, the construction of, or the furnishing of materials for, the improvement to real property." Under the above statutory scheme, owners or occupiers of property, designers, architects, surveyors, construction contractors and furnishers of materials are immune from liability for damages once the "exposure period" has lapsed. However, the statute also provides that "[t]his subsection does not affect the rights of any person injured as the result of any defect in any material used in an improvement to real property to commence an action for damages against the manufacturer or producer of the material." (emphasis added)

Since its original enactment, section 893.89, Wis. Stats., has been found to be constitutionally infirm. In Kallas Millwork Corporation v. Square D. Co., 66 Wis.2d 382, 225 N.W.2d 454 (1975)., the Wisconsin Supreme Court found a similar predecessor statute violative of equal protection. Kallas involved the scrutiny of sec. 893.155, Wis. Stats., which afforded special immunity to architects and contractors but specifically provided that "this limitation shall not apply to any person in actual possession and control as owner, tenant or otherwise . . . "Id. at 384. The court found that, for no rational reason, the statute discriminated in an arbitrary and unreasonable manner against owners and deprived them the very same protection that architects and contractors enjoyed. Id. at 389.

The Wisconsin Legislature subsequently revised the statute. Once again, the Wisconsin Supreme Court struck it down as unconstitutional in Funk v. Wollin Silo & Equipment, Inc., 148 Wis.2d 59, 76, 435 N.W.2d 244 (1989). Under the revised statute, land surveyors and furnishers of materials were added to the list of protected groups. While the statute deleted the previous limitation as to owners and occupiers of land, the court found that the legislative intent demonstrated that owners and occupiers were still left unprotected. In examining the Legislature's detailed findings and intent, the court concluded that there was no rational basis to protect some classes of defendants while unfairly shifting liability to others. The Funk court

expressly recognized the standing of the party challenging the constitutionality of the statute, even though the party was not an owner or occupier of the improved property.

The third and most recent revision of the statute took place in 1993. Although the statute now includes owners and occupiers of land as a protected class, it is still violative of the equal protection clause of the Wisconsin and U.S. Constitution because it still provides preferential immunity to some classes of defendants over, material manufacturers and producers for no rational reason.

In this case, plaintiffs have standing to challenge the constitutionality of section 893.55, Wis. Stats., because they have a personal and economic stake in the outcome. Funk at 68. Parties seeking to challenge the constitutionality of a statute on equal protection grounds must demonstrate that the statute treats members of a similarly situated class differently. Tomczak v. Bailey, 218 Wis.2d 245, 261, 578 N.W.2d 166 (citing State v. Post, 197 Wis.2d 279, 318, 541 N.W.2d 115 (1995)). The plain language of this statute can only be interpreted as excluding manufacturers or producers of the material used to construct an improvement to real property and denying them the immunity afforded to other similarly-situated defendants such as, for example, contractors and furnishers of materials. Thus, section 893.89, Wis. Stats., treats some classes of defendants differently than others.

A statute will be upheld under equal protection principles if a rational basis can be found to support the legislative classification. State v. Annala, 168 Wis.2d 453, 468, 484 N.W.2d 138 (1992). A legislative classification satisfies the rational basis test if it meets five criteria: (1) All classifications must be based upon substantial distinctions which make one class really different from another; (2) The classification adopted must be germane to the purpose of the law; (3) The classification must not be based upon existing circumstances only. [It must not be so constituted as to preclude addition to the numbers included within a class]; (4) To whatever class a law may apply, it must apply equally to each member thereof; and (5) The characteristics of the class should be so far different from those of other classes as to reasonably suggest at least the propriety, having regard to the public good, of substantially different legislation. Dane County v. McManus, 55 Wis.2d 413, 423, 198 N.W.2d 667 (1972).

Case law applying these criteria in the context of this statute and discussing possible legislative justifications for favoring one class of defendants over another serves as binding precedent in holding that there can be no rational basis for the current statute. The policy behind a statute of limitation is "to deny a court forum to those who have slept upon their rights and to protect a defendant from stale claims and from lawsuits brought at a time when memories have faded and a defense becomes more difficult." Rosenthal v. Kurtz, 62 Wis.2d 1,7, 213 N.W.2d 741 (1974). The statute in question is inconsistent with these goals. It is indisputed that plaintiffs here filed a timely action. Additionally, a manufacturer or producer of the material used in the improvement to real property is still obligated to mount a defense. By denying immunity to the manufacturers or producers of the materials used in the improvement to real property, the statute makes it impossible for them to seek indemnity from other defendants who either may have caused the negligence or had more control to prevent the negligent act. Because of their economic interest in being able to bring a timely action against all parties involved in the construction of the entire bleachers which injured Elaine Kohn, plaintiffs have standing to challenge section 893.55.

According to the Kallas court, the central question in the rational basis analysis is "what factors distinguish the favored class so that it requires or deserves an immunity not accorded others who appear similarly situated." In holding that the first version of section 893.89 violated equal protection, the Kallas court grounded its decision on language which is controlling to the case at hand:

> The arbitrary quality of the statute clearly appears when we consider that architects and contractors are not the only persons whose negligence in the construction of a building or other improvement may cause damage to property or injury to persons. If, for example, four years after a building is completed a cornice should fall because the adhesive used was defective, the manufacturer of the adhesive is granted no immunity. . . . But if the cornice fell because of defective design or construction for which an architect or contractor was responsible, immunity is granted. It can not be said that the one event is

> more likely than the other to occur within four years after construction is completed. Kallas at 390. (quoting Skinner v. Anderson, 38 Ill.2d 455, 459-60 (1967).

The Kallas court went on to conclude that:

> As pointed out by Mr. Justice Schaeffer, it is ludicrous to permit a recovery against a manufacturer of a negligently formulated mortar or adhesive, but to deny a recovery against an architect who negligently designed a cornice or façade so that its fall was inevitable. Kallas at 391-92.

Other possible legislative justifications have also been rejected by the Wisconsin Supreme Court. In Funk, a legislative expression that setting a finite point in time for barring actions was in the "public interest" was rejected as conclusory and of no real guidance because it did not explain why a certain time limitation rather than another was appropriate. Id. at 70-71. Another possible justification for exempting persons involved in the improvement to real property is that once substantial completion occurs, they lack the ability to become aware of defects or prevent problems avoided through maintenance and inspection. This justification was termed a "legally irrelevant distinction in the context of the statute". Id. at 74. The court commented that "even were we to give credence to the "control" rationale, the legislature did not apply it with consistency. Component parts manufacturers have even less control over a completed building than do architects and engineers, who may, at least, conduct inspections prior to turning buildings over to owners." Id. at 76. Finally, the court found that the statute served no rational basis because rather than advancing the policy of limiting "long tail liability" it simply shifted it to other defendants. Id. at 74.

A review of the legislative history surrounding the current revision is also devoid of any additional defensible policy reasons, studies or statistics which might justify exempting manufacturers or producers from immunity. Thus, for the reasons stated above, section 893.89, Wis. Stats., is unconstitutional because it offends the equal protection clause of both the U.S. and Wisconsin Constitutions.

B. **Section 893.89, Wis. Stats., Violates Article 1, Section 9 Of The Wisconsin Constitution Because It Operates To Deny The Plaintiffs The Right To A Remedy Under Statutory And Common Law**

Article 1, Section 9 of the Wisconsin Constitution provides:

> Every person is entitled to a certain remedy in the law for all injuries, or wrongs which he may receive in his person, property or character; he ought to obtain justice freely, and without being obligated to purchase it, completely and without denial, promptly and without delay, conformably to the laws.

This provision has been interpreted as not guaranteeing rights but rather preserving remedies that existed at common law. Aicher v. Wisconsin Patients Compensation Fund, 237 Wis.2d 99, 122, 613 N.W.2d 849(2000). It applies only when a prospective litigant seeks a remedy for a "legislatively recognized right." Id. at 123. The right-to-remedy clause preserves the right "to obtain justice on the basis of the law as it in fact exists." Id. at 123

Aicher involved a multi-pronged constitutional challenge to a statute of repose for medical malpractice actions. The court found that the statute did not violate Article 1, Section 9 because, at the time the cause of action accrued, a vested remedy did not exist. The language of the statute of repose granting immunity to defendants applied to everyone. The court reasoned that the Legislature was free to abrogate a cause of action which existed at common law.

Unlike the medical malpractice statute of repose in Aicher which fully extinguishes plaintiff's right to a cause of action based on medical malpractice, section 893.89, Wis. Stats., does not extinguish the plaintiff's right to file a cause of action based on defective design or manufacture. Rather, it severely narrows the class of defendants who plaintiffs could sue, namely manufacturers and producers of materials. Thus, at the time that plaintiffs in this case had a "legislatively recognized right" to seek redress based upon a defective design or manufacture claim, albeit to a limited class of defendants.

By not completely closing the doors to the courthouse, the Legislature has created an unreasonable situation in which the plaintiffs' right to file a cause of action based on defective

design or manufacturer and, more importantly, to seek a proper remedy is severely hampered by limiting the class of defendants to only manufacturers and producers of the materials. It creates the absurd result in which plaintiffs could conceivably be denied the right to be fully compensated for damages as a result of injury if it is found that someone within the protected group bears some or all of the fault for the alleged wrongful act. In contrast, it also would prevent the only available defendants (manufacturers or producers) from mounting a meaningful defense, conducting effective discovery, enjoining other possible tortfesors within the protected group or allowing them to seek contribution or indemnity from others responsible parties. For these reasons, section 893.89, Wis. Stats., operates to deny justice in violation of Article 1, section 9 of the Wisconsin Constitution.

Whereas the Aicher court has accepted that a rational relationship exists between legislative classification and a legitimate governmental need to modulate medical malpractice claims, case law interpreting section 893.89, Wis. Stats., has yet to recognize any rational basis and has twice stricken down close relatives of section 893.89 for the irrationality of its scheme of classifications. Case law interpreting section 893.89, Wis. Stats., have all expressed a common doubt regarding its constitutionality on Article 1, Section 9 grounds. See generally Rosenthal v. Kurtz, 62 Wis.2d 1, 213 N.W.2d 741 (1974)., Funk v. Wollin Silo & Equipment, Inc., 148 Wis.2d 59, 435 N.W.2d 244 (1989)., Kallas Millwork Corporation v. Square D. Co., 66 Wis.2d 382 (1975).

Based on the above analysis, section 893.89, Wis. Stats., is violative of the Fourteenth Amendment of the U.S. Constitution and Article 1, Section 1 of the Wisconsin Constitution. Upon accrual of the cause of action, plaintiffs had a vested property right. The procedures employed in the deprivation of seeking such a remedy violated the due process rights of plaintiffs.

Based on the foregoing, the Plaintiffs request this Court to deny the motion of Defendant Illinois Tool Works, Inc. for summary judgment and enter an Order declaring section 893.89, Wis. Stats., unconstitutional.

Dated in Milwaukee, Wisconsin, this 7th day of October, 2002.

Respectfully submitted,

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STATE OF WISCONSIN
SUPREME COURT
Appeal No. 03-1067
Circuit Court Case No. 01-CV-000048

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OF WISCONSIN

Elaine Marie Kohn, Ronnie A. Kohn,
and Lori K. Kohn,

Plaintiffs-Appellants,

Physicians Plus Insurance Corporation,

Plaintiff,

vs.

Darlington Community Schools, EMC
Insurance Company, Standard Steel
Industries, Inc., and Medalist Industries, Inc.

Defendants,

Illinois Tool Works, Inc.,

Defendant-Respondent-Petitioner.

Brief of Plaintiffs-Appellants

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Statutes:

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Issues Presented for Review

1. Were the bleachers that allegedly caused Elaine Kohn's injuries an "improvement to real property" within the meaning of §893.89, Wis. Stats., so that the Kohns' claims against Illinois Tool Works, Inc. were subject to that statute of repose?

   The Circuit Court said, "Yes."
   The Court of Appeals said, "No."

2. Is §893.89, Wis. Stats., invalid because it violates the equal protection clauses of the United States Constitution and the Wisconsin Constitution?

   The Circuit Court said, "No."
   The Court of Appeals did not address the issue.

3. Is §893.89, Wis. Stats., as applied in this case, also invalid because it violates Section 9 of Article I of the Wisconsin Constitution by denying the Kohns a remedy at law?

   The Circuit Court said, "No."
   The Court of Appeals did not address the issue.

Statement Regarding Oral Argument and Publication

Plaintiffs-appellants-respondents believe that this case can be best resolved with oral argument before the Court.

The opinion in this case should be published because it will enunciate a new rule of law or at least clarify or modify an existing rule; it also applies an established rule of law to a factual situation significantly different from that in published opinions; and it will decide a case of substantial and continuing public interest.

Statement of the Case

This is an action for damages related to injuries sustained as a result of alleged negligence and product liability. The action was commenced on August 15, 2001, by the filing of a complaint in Lafayette County Circuit Court, bearing Case No. 01-CV-048. An amended complaint was filed on April 15, 2002. Defendant-Respondent-Petitioner Illinois Tool Works, Inc. filed a motion for summary judgment on or about August 7, 2002. On January 23, 2003, the circuit court granted the motion for summary judgment. Judgment was entered on February 5, 2003, dismissing the action against

defendant Illinois Tool Works, Inc. A timely notice of appeal was filed on or about April 15, 2003.

The Court of Appeals reversed the Judgment in an unpublished decision dated July 1, 2004, holding that the bleachers in question were not an improvement to real property within the meaning of §893.89, Wis. Stats. Defendant-Respondent-Petitioner filed a Petition for Review in this Court on July 30, 2004, which was granted by the Court on November 17, 2004.

Statement of Facts

On June 18, 1969, Defendant Darlington Community School District ("Darlington") entered into an agreement with Defendant Standard Steel Industries, Inc. ("Standard Steel"), to supply materials and supervise the installation of portable aluminum bleachers at Darlington High School. R. 41 at 2. After selecting the material and installing the bleachers, Standard Steel merged with and became Defendant Medalist Industries, Inc. ("Medalist"). Id. Later another merger occurred, when Medalist merged into its parent company, Defendant-Respondent-Petitioner Illinois Tool Works, Inc.

("ITW"). Id. ITW is the only surviving entity of the three above-named companies. Id. at 3.

On the afternoon of Friday, September 29, 2000, Plaintiff Lori K. Kohn attended a Darlington Redbirds football game with her daughter, plaintiff Elaine Marie Kohn ("Elaine"). R. 22 at 4; R. 41 at 2-3. Elaine was four and one-half years old when she attended the football game that day. R. 22 at 4. During the football game, Elaine and her mother occupied seats on the aluminum bleachers installed by ITW's predecessor in interest. R. 41 at 1-3. At approximately 2:30 p.m., through no fault of her own, Elaine fell through the large but regular space at the foot of her seat in the bleachers. R. 22 at 4-5. Elaine landed on the hard surface approximately 15 feet below the bleachers. R. 22 at 4-5. As a result of her fall through the bleachers, Elaine sustained a fractured skull, epidural hematoma, neurological injuries, and serious pain and suffering. Subsequent to the accident, Elaine's condition required her to have surgery and hospitalization for several days. R. 22 at 5.

In the amended complaint, the Kohns allege that because of the dangerously defective nature of the bleachers

that existed when the bleachers left the possession and control of ITW's predecessor in interest, the seller, ITW is subject to liability. R. 22 at 7. Further, the amended complaint alleges that, as the only surviving corporation of the three named defendants, ITW is strictly liable to the Kohns. R. 22 at 7.

In August of 2002, ITW filed a Motion for Summary Judgment, contending that the bleachers which caused Elaine's injuries constituted an "improvement to real property." R. 41. Therefore, ITW argued, the period of limitations set forth in §893.89, Wis. Stats., which permits a cause of action for only ten years after an improvement to real property was substantially completed, barred the Kohns' claims against ITW. R. 41. Based on that argument, the circuit court granted the motion and entered judgment dismissing the action against ITW. R. 70.

Argument

Introduction

Plaintiffs-Appellants-Respondents Elaine Marie Kohn, Ronnie A. Kohn, and Lori K. Kohn (hereafter the "Kohns") challenge the applicability of §893.89 to this case. They also challenge the constitutionality of the statute on the grounds

that it violates the equal protection clauses of the Wisconsin Constitution and the United States Constitution as well as Section 9 of Article I of the Wisconsin Constitution.

I. Standard of Review.

The issues being appealed in this case are subject to the *de novo* standard of review. Specifically, whether bleachers constitute an "improvement to real property" under §893.89, Wis. Stats., is a question of law which is reviewed *de novo*. Kallas Millwork Corp. v. Square D. Co., 66 Wis. 2d 382, 386, 225 N.W.2d 454 (1975). The constitutionality of a statute also is an issue of law which is reviewed *de novo*. State v. Borrell, 167 Wis. 2d 749, 762, 482 N.W.2d 883 (1992).

This Court's decision in Swanson Furniture Company of Marshfield, Inc. v. Advance Transformer Co., 105 Wis. 2d 321, 313 N.W.2d 848 (1982) further suggests that the Darlington bleachers should not be classified as an improvement to real property. In Swanson, the Court held, for reasons that are directly applicable to the present case, that light fixtures do not constitute an improvement to real property. In so holding, the court identified light fixtures as an item "manufactured without any particular project considered" and "sold for use to

be determined by someone else later in the commercial chain." Id. at 327. The light fixtures were "not designed and not manufactured as an improvement for the . . . real property, but were to be used for an improvement to *any* real property." Id. (emphasis supplied). All of the factors, which are applicable to the bleachers in this case, contributed to the conclusion in Swanson that a fixture is not an "improvement to real estate."

The record contains no suggestion that the bleachers installed on the Darlington Community School grounds were specifically manufactured or designed for that location. Rather, they were manufactured and designed for any, undetermined location. Under Swanson, the fact that the bleachers were generically fabricated and only happened to be installed at their present location confirms that they are not an improvement to real property.

II. The Bleachers That Caused Elaine Kohn's Injuries Were Not an "Improvement to Real Property," Within the Meaning of §893.89, Wis. Stats.

ITW argues that the decision of the Court of Appeals in this case failed to follow the definition of "an improvement" set forth in Webster's Third International Dictionary, 1965, which is cited in this Court's decision in Kallas Millwork Corp.

v. Square D Co., 66 Wis. 2d 382, 386, 225 N.W.2d 454 (1975). ITW's Brief at 14. However, the fact is that the decision of the Court of Appeals is consistent with the dictionary definition of "an improvement." The critical point is that the bleachers in this case failed to meet that definition because they were not "a permanent addition to or betterment of real property," as provided in the primary phrase of the definition.

ITW acknowledges that this Court held in Kallas that an underground pipeline met the definition and the standard for "an improvement to real property." Id. at 15. The problem with ITW's argument is that the bleachers in this case are not like the underground pipeline in Kallas. Likewise, ITW acknowledges this Court's conclusion in U.S. Fire Ins. Co. v. E.D. Wesley Co., 105 Wis. 2d 305, 313 N.W.2d 833 (1982), that "a high-pressure water system designed for fire protection constituted 'an improvement to real property.'" ITW's Brief at 15, *citing* Kallas, 66 Wis. 2d at 386. The Court in Wesley said, "as a matter of law that when the pipeline was connected to the equipment located on the [defendant's] real property, that pipeline became an improvement of the [defendant's] real property." Id. at 15, *citing* 105 Wis. 2d at 309. Again, however,

a high-pressure water system designed for fire protection of all that is on the property is clearly distinguishable from the portable bleachers resting on the ground in the case at bar. In its decision in this case the Court of Appeals properly noted these distinctions. App 003-004.

ITW faults the Court of Appeals for relying in part upon the decision of the Minnesota Court of Appeals in Massie v. City of Duluth, 425 N.W.2d 858 (Minn. Ct. App. 1988). ITW's Brief at 16. Yet, the decision in Massie that the city's waterslide was not "an improvement to real property" is consistent with the dictionary definition of "an improvement" and this Court's enunciated standard. In Massie, as with the bleachers in the case at bar, the waterslide was not "a permanent addition to or betterment of" the city's real property.

ITW attempts to support its argument that the bleachers were "a permanent addition to or betterment of real property" by asking a rhetorical question: "Indeed, what else could permanent bleachers at an athletic field be?" Id. at 16. However, that rhetorical question itself is a loaded question; it is also a tautology. ITW claims that the bleachers' "permanency is a function of their purpose," but it has no

authority to cite for that assertion. Id. at 16-17. It says, "Presumably, if Darlington had put a water or oil tank on the same [property], there could be no question that it would be an improvement of real property." Id. at 17. We concede as much, because a water or oil tank becomes a part of the property in the same way that a high-pressure water system or an underground pipeline does – in a way that unaffixed easily disassembled bleachers do not.[1]

ITW advances the spurious argument that the bleachers "were installed" and that they are "anchored to their foundation." Id. at 17-18. A reasonable reference to the evidence put forth in its Appendix by ITW itself clearly indicates otherwise. It is patent from many of the photographs in the Appendix that the bleachers are a portable structure merely resting upon the ground upon which they sit. *See, e.g.*, App. 072 (lower), 073 (upper), 074, 076, 077 (upper), 079 (upper), 081, 082 (upper), 083 (lower), and 085 (upper). The

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[1] Curiously, ITW then states: "That, instead of water or oil, the bleachers hold students, parents and fans, is not a meaningful distinction at all." ITW's Brief at 17. In fact, it is an important distinction, because water and oil cannot be harmed by the fact that the structures holding them are a hazard, an attractive nuisance, or a defective product.

pictures speak a thousand words in support of the decision of the Court of Appeals.

There is no evidence in the record to suggest that the bleachers in fact were manufactured or designed specifically for the Darlington location. To the contrary, the evidence actually belies that conclusion. ITW's bid, dated June 13, 1969, says that it shall "furnish all material for PORTABLE ELEVATED BLEACHERS." App. 067 (emphasis in the original). The bid twice makes reference to the fact that the "portable elevated bleachers" are to be "erected" upon the site. Id. The bleachers are merely erected out of primarily metallic materials, as detailed in the bid, and then set upon the ground where they sit free-standing.

ITW stresses that "the bleachers were never disassembled or moved." ITW's Brief at 18. However, the point is that they always could have been moved in a way that an underground pipeline or a high-pressure water system could not. The latter are unique to the land they are a part of and could not just be taken apart and put elsewhere exactly as they are now for further use in another location. The bleachers

in this case can be.[2] The relevant question is whether they *are movable*, which is the real test to be applied in determining whether something is a "permanent addition to or betterment of real property" so as to be deemed an improvement to real property covered by the statute. Kallas, 66 Wis. 2d at 386.

The fact that the bleachers sold to the Darlington School District were "portable" undermines the claim that they were an improvement to real property. The "degree of physical annexation" affects whether an item is deemed an improvement to real property. Adair v. Koppers Co., Inc., 741 F.2d 111, 115 (6th Cir. 1984). In none of the cases cited in the parties' briefs was an item that was portable deemed to be an improvement to real property. *See, e.g.*, Kallas, Adair, Wesley and Massie. No doubt the degree of physical annexation of the high-pressure water system designed for fire protection in

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2 ITW again chides the Court of Appeals for asserting that, in both Kallas and Wesley, the "pipes could not be moved absent extensive excavation." ITW's Brief at 18 n.2, *citing* App. 004-005, ¶7. ITW's point is that there is no indication in the Kallas decision that the pipes of the high pressure water system in Kallas were underground as the pipeline was in Wesley. Id. The real point is that both the underground pipeline and the high pressure water system are truly special to the land they are either on or under, so that reasonably they may be viewed as being "a permanent addition to or betterment of real property."

Kallas and the degree of physical annexation of the underground oil pipeline connected to equipment located on the defendant's property in Wesley were of critical importance to the findings that those items were improvements to real property.

ITW says, "This Court has clearly stated that the [proper] analysis involves the effort and expenditure undertaken to *install* the improvement." Id. at 18-19 (emphasis in the original), *citing* Kallas, 66 Wis. 2d at 386. By that standard, the decision of the Court of Appeals in this case is most appropriate, because it is clear that the bleachers were not "installed" and certainly not with either notable effort or expenditure. Instead, it is obvious that the true cost of the bleachers was in the cost of the portable metallic structure itself.

A substantial portion of ITW's argument that the bleachers were an improvement to real property is based upon decisions from other jurisdictions outside of Wisconsin.[3] ITW's

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[3] It is ironic that ITW argues that the Court of Appeals erred in its decision in this case by relying upon the Massie case from Minnesota and then relies upon numerous decisions from other jurisdictions around the country.

Brief at 19-22. Of course, those cases are not binding precedent for this Court. More importantly, each case is distinguishable from the case at bar.

Florence County Sch. Dist. No. 2 v. Interkal, Inc., 559 S.E.2d 866 (S.C. Ct. App. 2002) involved bleachers, but there the similarities end. The appellate court decision does not address the issue of whether the bleachers were an improvement to real property.[4] 559 S.E.2d at 868-69. Instead, the issue reviewed was whether the underlying liability of a joint tort feasor could be barred at all by a statute of repose. Id. Even the nature of the bleachers themselves is not discussed in depth in the opinion. However, the bleachers in Florence County are distinguishable from the bleachers in the case at bar simply because they were installed inside the gymnasium of the school, presumably attached permanently to the fixed interior walls of the gymnasium. Id. at 867.

McDonough v. Marr Scaffolding Co., 591 N.E.2d 1079 (Mass. 1992) likewise involved bleachers, but, again, the

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[4] The original decision under review in Florence County was written by a special referee, not a court of law. 559 S.E.2d at 868. The court of appeals decision does not address the correctness of the special referee's holding that the bleachers were "improvements to real property." Id. at 868-69.

differences between that case and this are much greater than any apparent similarities. In McDonough, the bleachers were specifically designed for the town's skating rink, unlike the generic bleachers in the instant action. *See* 591 N.E.2d at 1081 ("Marr assembled and installed the uniquely configured bleachers in the rink"). Moreover, in McDonough, again, the appellate court does not actually address the issue of whether the bleachers were an "improvement to real property." Id. at 1080-84. Instead, its decision focused on the issue of whether the plaintiff could avoid the statute of repose by alleging that the defendant was a "mere supplier" that allegedly did nothing more than assemble and erect the bleachers. ITW's status is not at issue in the case at bar.

Snow v. Harnischfeger Corp., 823 F.Supp. 22 (D. Mass. 1993), *aff'd*, 12 F.3d 1154 (1st Cir. 1994), involved a large crane that was part of an industrial refuse plant. 823 F.Supp. at 23. Many components of the crane were custom designed. *See* 823 F.Supp. at 24 ("The components of the crane which were custom designed were: (a) the grapple buckets, (b) the length and diameter of wire rope, (c) the hoist drum length and diameter, (d) the gear reducers, (e) the motors (electric), (f) the

sizes of the control components, (g) the trolley spread, (h) the electric conductor system, (i) the operator's cab, (j) the bridge girder sections, (k) the bridge drives and speeds, (l) the trolley drives and speeds, (m) the size of electrical conductors, (n) the bridge and trolley wheel size and types, (o) the bridge rails, and (p) the crane electrical control systems and electrical protection panels.") The main issue in the case was whether the crane was mass-produced or custom-designed, and the question of whether the crane itself was an "improvement to real property" was not a question comprehensively discussed by the court. The crane at issue was one of two overhead cranes constructed over a period of two years prior to the time that the plant opened for business, and there was never any question that the overhead cranes were an integral part of the plant and, as such, an obvious improvement to the real estate. Id.

Robinson v. Chin & Hensolt, 120 Cal. Rptr. 2d 49 (Ct. App. 2002) is similar to Snow. In Robinson, cable car turnarounds, like the cranes in Snow, were held to be improvements to real property. 120 Cal. Reptr. 2d at 58. Critically, the application of the California statute of limitations

involved in that case did not hinge upon the question of whether the item is physically attached to real property. Id. Instead, the issue was "whether the defendants belong to the classes of construction contractors protected under the statute." Id. Clearly, Robinson is inapposite.

In Jarnagin v. Fisher Controls Int'l, Inc., 573 N.W.2d 34 (Iowa 1997), LP gas regulators were found to be an "improvement to real property," and thus, their manufacturers were protected by the statute of repose. The court found that the regulators clearly were designed to make the property more useful and valuable by providing regulation of gas pressure to the home's furnace and appliances. 573 N.W.2d at 36-37. The decision in Jarnagin is consistent with this Court's decisions in Kallas and Wesley, because the LP gas regulators in Jarnagin are similar to the high-pressure water system in Wesley and the underground pipeline in Kallas. Not only were the LP gas regulators permanent, *see* 573 N.W.2d at 36, but they were essential to the operation of the furnace and other appliances within the building erected upon the real estate. 573 N.W.2d at 36-37. As such, the gas regulators are

distinguishable from the bleachers resting upon the ground near the football field in this case.

Pendzsu v. Beazer East, Inc., 557 N.W.2d 127 (Mich. Ct. App. 1996) involved contractors which had installed coke ovens at a Ford plant in the 1930s, relined those ovens in the 1960s and in 1979, and also relined and enlarged blast furnaces and coke ovens at another plant in 1973. 557 N.W.2d at 130. Again, the court found that the relining of the ovens and furnaces was "integral" to the usefulness of the respective plants and as such were part and parcel of the plants themselves and obviously an improvement to the real estate. Id. at 132. The court likened the objects in Pendzsu to a conveyor system and a heating-ventilation-air conditioning system at issue in two other applicable Michigan cases. Id. Again, a conveyor system and a heating-ventilation-air conditioning system are analogous to a high-pressure water system and an underground pipeline. They are not similar to the personal property resting upon the real estate in the case at bar.

Hayslett v. Harnischfeger Corp., 815 F.Supp. 1294 (W.D. Mo. 1993) involved a crane similar to the one manufactured by

the same company that was the defendant in Snow. The facts in Hayslett are similar to Snow in that the crane was "firmly affixed to the Armco property by a number of concrete, piered footings which supported the crane's rail transport system," and "[a]ccess to the crane was accomplished by a system of catwalks, stairways and platforms incorporated into the crane's design." 815 F.Supp. at 1298. In short, "The crane was an essential component to Armco's metal recycling business . . . [and its] recycling operation." Id. Importantly, "Armco specially ordered the crane, designating the specifications necessary for use in the Armco metal recycling facility in Kansas City, Missouri." Id. at 1299. The bleachers in the instant action are, by contrast, clearly a fungible item.

Finally, Dedmon v. Stewart-Warner Corp., 950 F.2d 244 (5th Cir. 1992), also is inapposite to the case at bar. The critical issue in that case was whether the defendant manufactured a component part or a permanent "improvement to real property." 950 F.2d at 245-46. The object in question was a furnace designed for an overall home heating and air-conditioning system. Id. The court held that it was an improvement, rather than a component part, because it was

integral to the overall heating system connected to it by fuel lines and by flue and duct work leading from it. Id. The critical distinction to the court was that the furnace was part of an overall system running throughout the dwelling. Id. at 248. The bleachers in the case at bar have no such feature. Not only are they free-standing, but they are entirely independent in and of themselves.

III. Even If the Bleachers Properly Were Determined to Be an "Improvement to Real Property," §893.89, Wis. Stats., Is Invalid on its Face and Is Not Applicable Because it Is Unconstitutional.

A. Plaintiffs have standing to challenge the constitutionality of §893.89.

The Kohns have standing to challenge the constitutionality of §893.89, because they have a personal and economic stake in the outcome of such a challenge. State v. Iglesius, 185 Wis. 2d 117, 131, 517 N.W.2d 175 (1994).

In the Circuit Court Plaintiffs-Appellants-Respondents argued that §893.89, Wis. Stats., is unconstitutional. Petitioner for Review, at 4. The question was fully briefed by the parties in the Circuit Court and in the Court of Appeals. ITW's Brief at 5. "[P]laintiffs argued that Wis. Stat. §893.89 did not apply because this is a products liability case or, alternatively, that

the statute is unconstitutional." Id., *citing* R.41, 46, 51 and 52. The issue of constitutionality was not decided by the Court of Appeals, because it was unnecessary to do so in light of its decision that the bleachers were not "an improvement to real property." App. 001-005. In the event this Court were to reverse the Court of Appeals on that issue, the issue of the constitutionality of the statute is ripe for decision. In that sense, Plaintiffs-Appellants-Respondents believe that the issue of constitutionality implicitly is set forth in the Petition for Review, as provided in §809.62(6), Wis. Stats.

> B. On two previous occasions the statute has been held by this Court to be unconstitutional because it violates the equal protection clauses of the United States Constitution and the Wisconsin Constitution, and the critical defect has not been corrected.
>
> 1. Twice this Court has declared §893.89 unconstitutional on equal protection grounds.

Since its original enactment, §893.89, Wis. Stats., has been found to be constitutionally infirm because it offered immunity from suit arising out of personal injury to some classes of defendants involved in the improvement of real

property, but not to others. In Kallas, for example, the Court found that the original statute, §893.155,Wis. Stats., violated equal protection because it afforded special immunity to architects and contractors, but specifically provided that "this limitation shall not apply to any person in actual possession and control as owner, tenant or otherwise . . . ." 66 Wis. 2d at 384. The Court in Kallas found that the statute discriminated in an arbitrary and unreasonable manner against owners and deprived them the protection that architects and contractors enjoyed. Id. at 389.

After the statute was revised by the Wisconsin Legislature, the Court once again struck it down as unconstitutional in Funk v. Wollin Silo & Equipment, Inc., 148 Wis. 2d 59, 435 N.W.2d 244 (1989). Although the previous limitation as to owners and occupiers of land technically had been deleted from the statute, the Court found that the legislative intent demonstrated nonetheless that owners and occupiers remained unprotected. Id. The Court concluded that there is no rational basis to protect some classes of defendants while unfairly shifting liability to others. Id. That

basic defect continues to infect the statute in its current form, §893.89, perpetuating its unconstitutionality to this day.

ITW cannot explain effectively how or why a class that produces unchanged work is different from a class whose work (or workmanship) does not change after the moment of substantial completion. It is undisputed that ITW, or its predecessors, distributed and supervised the installation of the bleachers and that the bleachers were never dissembled or moved and have remained intact and in their present location since their 1969 installation. Therefore, ITW in fact stands in the identical shoes of the manufacturer or producer of the material from which the bleachers were made. From the time of the completion of the installation of the bleachers in 1969, a defective and dangerous product has stood upon the grounds of the Darlington High School as a patent danger to the public and particularly to young children such as Elaine Marie Kohn. The danger is the result of the defective product, and it is irrelevant whether the defect causing the danger is a defect in the material from which the bleachers are made or a defect in their design or construction.

Workmanship is not the issue. Nothing has changed in the design or construction of the bleachers from the first day they were installed. They have been defective since that very first day.

The continuing irrationality and unreasonableness of the statute may be seen most clearly by comparing the bleachers to a dangerous attractive nuisance or any other dangerous instrumentality. If ITW had placed a defective roller coaster on the school grounds, no one would be arguing that injury caused by it was beyond legal liability. Likewise, a statute of repose would make no sense in the case of an attractive nuisance, which lured children to danger and their extreme peril. Section 893.89, in offering protection to contractors generally irrespective of the facts of the case, and not to a manufacturer or producer of material no matter what the facts may be, is irrational and unreasonable on its face.

2. Section 893.89, in its present form, continues to violate the equal protection clause of the U.S. Constitution and the Wisconsin Constitution.

Although in 1993 the Legislature corrected the flaw of excluding owners and occupiers of land from the immunity offered in §893.89, the statute still violates the equal protection clauses of the state and federal constitutions because it continues to exclude material manufacturers and producers from immunity for no rational reason. Specifically, the statute provides that it "does *not* affect the rights of any person injured as the result of any defect in any material used in an improvement to real property to commence an action for damages *against the manufacturer or producer of the material.*" §893.89(2), Wis. Stats. (emphasis supplied).

A statute is unconstitutional as a violation of the equal protection clauses of the state and federal constitutions if it treats members of similarly situated classes differently without a rational basis for doing so. Castellani v. Bailey, 218 Wis. 2d 245, 261, 578 N.W.2d 166 (1998), *citing* State v. Post, 197 Wis. 2d 279, 318, 541 N.W.2d 115 (1995). Here, the manufacturers and

producers of the material used to construct an improvement to real property continue to be unconstitutionally denied the immunity afforded to other similarly situated defendants such as, for example, contractors or others who chose or knowingly distributed the defective material. Conversely, the statute on its face irrationally continues to provide immunity to parties such as ITW that is not extended to others similarly situated.

A statute will be upheld under equal protection principles if a rational basis can be found to support the legislative classification. State v. Annala, 168 Wis. 2d 453, 468, 484 N.W.2d 138 (1992). A legislative classification satisfies the rational basis test if it meets five criteria: (1) all classifications must be based upon substantial distinctions which make one class really different from another; (2) the classification adopted must be germane to the purpose of the law; (3) the classification must not be based upon existing circumstances only, *i.e.*, it must not be so constituted as to preclude possible addition to the numbers included within a class; (4) to whatever class a law may apply, it must apply equally to each member thereof; and (5) the characteristics of the class should be so far different from those of other classes as to reasonably

suggest at least the propriety, having regard to the public good, of substantially different legislation. Dane County v. McManus, 55 Wis. 2d 413, 423, 198 N.W.2d 667 (1972).

None of those factors is germane to §893.89 so as to distinguish properly the classes favored by the statute, such as contractors or distributors, from the manufacturers and producers disfavored by the statute. The statute provides that protected classes are only exposed to liability for ten years after the "moment of substantial completion" of their project. The exposure period is allowed to end after that period of time because, presumably, the protected classes will not have modified or been involved in any way with their original work after the moment of substantial completion. Thus, in order to limit those classes' exposure to liability, the Legislature drew a line in the sand at the ten-year mark, freeing the classes included in the statute from potential liability for any projects they completed longer than ten years ago.

While the desire to limit liability in that regard may make sense, it makes no sense whatsoever that a manufacturer or producer of material cannot enjoy similar immunity. It cannot be disputed that manufacturers and producers, like the

other classes protected by the statute, reach a "moment of substantial completion" with regard to their work. Once a product is manufactured, the manufacturer/producer ceases to be involved with that product. That is similar to the way that a contractor or distributor ceases to be involved with a construction project once the project is complete. Nevertheless, the statute irrationally limits liability for contractors, distributors, and others but does not provide the same protection to manufacturers or producers. The liability of a manufacturer or producer is allowed to continue indefinitely. It is not clear, nor is ITW able to create an argument for - or to make a proper evidentiary record for - the conclusion that a manufacturer's relationship to its product is distinctly different from that of a contractor or any other class of persons protected by the statute. Therefore, §893.89 irrationally treats similarly situated classes differently, and it violates the principles of equal protection of the law.

The statute's separate exclusion of a certain class of *owners* from its protection sheds light on why its exclusion of manufacturers has no rational basis. Section 893.89(4)(c) prohibits immunity for owners if the injury resulted from

negligence in the maintenance, operation, or inspection of an improvement to real property. Owners, therefore, are excluded from immunity if they are actively and continuously involved in the improvement that caused the injury. In other words, it is impossible to attach a moment of substantial completion to the active owner's work on the improvement, and therefore its liability cannot be excluded as it is with other entities protected by the statute. As shown above, however, the manufacturer - unlike the active owner - has no such ongoing involvement with the improvement. Rather, the manufacturer, like the contractor, completes its work at an identifiable moment and, therefore, its liability should be similarly limited.

Language from Kallas regarding the unconstitutionality of the former versions of §893.89, should be controlling when evaluating the constitutionality of the classifications in the present statute. Specifically, the Court stated:

> The arbitrary quality of the statute clearly appears when we consider that architects and contractors are not the only persons whose negligence in the construction of a building or other improvement may cause damage to property or injury to person. If, for example, four years after a building is completed a cornice should fall because the adhesive used was defective, the manufacturer of the adhesive is

> granted no immunity . . . But if the cornice fell because of defective design or construction for which an architect or contractor was responsible, immunity is granted. It cannot be said that the one event is more likely than the other to occur within four years after construction is completed.

Kallas, 66 Wis. 2d at 390.

That statement supports the Kohns' argument in that it highlights the lack of distinguishing factors between manufacturers and the classes which enjoy immunity under the statute.

The Court in Funk used language, in holding the second version of the statute unconstitutional, that is also applicable to the flaws in the current version. Specifically, the Court observed that rather than advancing the policy of limiting the "long tail" of liability, the second version of the statute simply shifted liability to other defendants. Funk, 148 Wis. 2d at 74. The present statute, by arbitrarily denying protection to manufacturers and producers, also shifts liability irrationally onto them.

C. Section 893.89, as applied, also is unconstitutional because it violates Section 9 of Article I of the Wisconsin Constitution.

Article I, Section 9, of the Wisconsin Constitution states as follows:

> Every person is entitled to a certain remedy in the laws for all injuries, or wrongs which he may receive in his person, property, or character; he ought to obtain justice freely, and without being obliged to purchase it, completely and without denial, promptly and without delay, conformably to the laws.

Section 893.89, as applied to this case, has the effect of directly violating the above-cited provision from the Wisconsin Constitution. Rather than recognizing the Kohns' *entitlement* to a remedy at law for her injuries, §893.89 has the direct effect of extinguishing any remedy as of way back in 1979 – ten years after ITW allegedly substantially completed the bleachers, *and four years before Elaine Kohn was born.* That result patently deprives the Kohns – and Elaine Kohn in particular – of that to which she is entitled under Art. I, §9 of the Wisconsin Constitution. Therefore, the statute of repose is unconstitutional.

The constitutionality of statutes of repose, such as §893.89, is by no means a settled issue. In Silbaugh v. Strang,

2000 WL 19807 (Wis. App. Jan. 6, 2000), the Court of Appeals highlighted the contradictory decisions that have emerged from Wisconsin courts regarding this issue. The Kohns' case, once again, highlights the unfairness of the application of a statute of repose. When applied to the facts of this case, the statute irrationally leaves injured Plaintiffs with no remedy whatsoever against ITW.

While this Court left no doubt in Aicher v. Wisconsin Patients Compensation Fund, 2000 WI 98, ¶¶53-54 and 78, 237 Wis. 2d 99, 613 N.W.2d 849, that §§893.55(1)(b) and 893.56, Wis. Stats., (statutes of repose regarding medical malpractice actions) do not violate either the equal protection provisions of the United States Constitution and Wisconsin Constitution or art. I, §9 of the Wisconsin Constitution, the Court explicitly acknowledged that the constitutionality of statutes of repose generally remains a matter of uncertainty. 2000 WI 98, ¶45. While the statutes of repose in the medical malpractice context may pass constitutional muster, §893.89, Wis. Stats., does not.

In Aicher, the Court emphasized the history of the medical malpractice statutes of repose and the fact that there was a strong basis for the legislative policy underlying their

enactment - noting that they were enacted in response to a sudden increase in the number of malpractice suits, the size of the awards, the effect of that upon malpractice insurance premiums, and several impending dangers including increased health care costs, the prescription of elaborate "defensive" medical procedures, the unavailability of certain hazard services, and the possibility that physicians would curtail their practices. 2000 WI 98, at ¶22. The Court carefully distinguished the general policy behind statutes of repose - that they operate to protect both plaintiffs and defendants from litigating claims in which the truth may be obfuscated by death or disappearance of key witnesses, loss of evidence, and faded memories. Id. at ¶27. None of the above policy considerations is present in the case at bar.

Of the medical malpractice provisions, the Court said:

> These provisions reflect the legislature's view that prompt litigation ensures fairness to the parties. A case such as this one, in which the physician allegedly responsible for the malpractice is deceased and no longer able to defend himself, illustrates precisely the type of stale claim that statutes of limitations and statutes of repose are designed to ameliorate.

Id. at ¶53. In sharp contrast, the instant action involves physical evidence that is and has been unchanged during the

more than three decades the bleachers have been in place. The defective and dangerous instrumentality is available for inspection, testing, and evaluation today just as well as it was upon installation in 1969. The evidence is not stale. No party is prejudiced in defending itself. None of the policy considerations normally underlying an enforceable statute of repose is extant in the case at bar.[5]

We acknowledge that art. I, §9, confers no legal right. However, §893.89 irrationally deprives the Kohns of a remedy for an already existing right. In the instant action there is no rational or reasonable basis for depriving the Kohns of

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5 Cases other than Aicher which may be cited in support of the constitutionality of statutes of repose also are distinguishable. Whether they have to do with medical malpractice, as did Aicher, or some other subject matter such as paternity, land surveying, or contracts, each case cited has a true, strong and compelling public policy foundation underlying the respective statute of repose that justifies imposing it, to the detriment of the plaintiff. For example, in CLL Associates Limited Partnership v. Arrowhead Pacific Corp., 174 Wis.2d 604, 611-12,497 N.W.2d 115 (1993), where the issue was whether a statute of repose was constitutional in a contract action, this Court stressed critical differences between contract law and tort law. It reasoned that a statute of repose was grounded in sound policy in the contract context, while it would not be in tort cases, because tort law, as a matter of justice, shifts losses caused by personal injury to one at fault, deters unsafe behavior by placing the cost of injury with one in a position to prevent injury, and compensates the victim by creating a mechanism (usually insurance) to distribute losses widely. Id. Importantly, the case at bar is a tort action.

compensation for injuries caused by ITW's negligence in distributing and installing an inherently defective and dangerous product.

Conclusion

For the foregoing reasons, Plaintiffs-Appellants-Respondents request that the Decision of the Court of Appeals, reversing the Order and Judgment of the Circuit Court, be affirmed and that the cause be remanded to the Circuit Court for trial.

Respectfully submitted,

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Dated: January 4, 2005

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief conforms to the rules contained in §§809.19(8)(b) and (c), Wis. Stats., for a brief produced with a proportional serif font. The length of this brief is 6,846 words.

David E. Lasker, Esq.

STATE OF WISCONSIN
IN THE
SUPREME COURT

Appeal No. 03-1067
LaFayette County Circuit Court Case No. 01-CV-048

ELAINE MARIE KOHN, RONNIE A. KOHN and
LORI K. KOHN,

Plaintiffs-Appellants,

PHYSICIANS PLUS INSURANCE CORPORATION,

Plaintiff,

v.

DARLINGTON COMMUNITY SCHOOLS,
EMC INSURANCE COMPANY,
STANDARD STEEL INDUSTRIES, INC., and
MEDALIST INDUSTRIES, INC.,

Defendants,

ILLINOIS TOOL WORKS INC.,

Defendant-Respondent-Petitioner.

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ITW has little to add to its initial argument that the bleachers at the Darlington High School football field are an improvement to real property pursuant to Wis. Stat. § 893.89; the Kohns' response brief argues this issue based on the flawed premise that *any* improvement which *can be* disassembled or moved is, *per se*, not an improvement to real property entitled to the statute's protection. That is not the law. Whether something is an improvement to real property under the statute of repose in § 893.89 depends on several factors—its cost, permanency, and enhancement of the value and utility of property on which it is built—none of which turn on the fact that it can be disassembled.

The Kohns also argue that Wis. Stat. § 893.89 is unconstitutional, an argument that failed in the trial court. The Kohns' constitutional challenge must also be denied by this Court because the Kohns fail to recognize the purpose of, and this Court's endorsement of, statutes of repose. The Kohns also misunderstand the fundamental differences between the classes protected by the statute and the classes whose liability is not extinguished upon the expiration of the

ten-year statute of repose. The statute creates three basic classes of potential defendants: manufacturers or producers of defective material used in an improvement to real property (not protected); owners and occupiers responsible for the maintenance, operation and inspection of improvements to real property (not protected); and, generally, anyone involved in designing and building the improvement (protected ten years after substantial completion). The first two classes' duty is not extinguished after ten years because their work is either unchanged or ongoing; that is, they are held responsible for their work as it was when it was performed. In contrast, the protected class includes numerous parties whose work can no longer be fairly judged due to use, the passage of time, changes in technology and changes in statutes, codes and regulations.

I. THE KOHNS MISUNDERSTAND, AS DID THE COURT OF APPEALS, THE TEST FOR WHAT IS AN IMPROVEMENT TO REAL PROPERTY PURSUANT TO WIS. STAT. § 893.89.

This Court has been consistent in its determinations of what is an "improvement to real property" under the predecessors to Wis. Stat. § 893.89. The determination is made based on the common usage of the terms from the

statute. *See U.S. Fire Ins. Co. v. E.D. Wesley Co.*, 105 Wis. 2d 305, 313 N.W.2d 833 (1982); *Kallas Millwork Corp. v. Square D Co.*, 66 Wis. 2d 382, 225 N.W.2d 454 (1975).

According to the dictionary definition employed by this Court in *Kallas*, an improvement is:

> [A] permanent addition to or betterment of real property that enhances its capital value and that involves the expenditure of labor or money and is designed to make the property more useful or valuable as distinguished from ordinary repairs.

Kallas, 66 Wis. 2d at 386, *citing* WEBSTER'S THIRD INTERNATIONAL DICTIONARY, 1965. The standard is clear. In order to be an improvement to real property under Wis. Stat. § 893.89, the bleachers must have: been a permanent addition to or betterment of the property; enhanced the property's capital value; involved the expenditure of money or labor; and been designed to make the property more useful. *See Kallas*, 66 Wis. 2d at 386.

Inexplicably, this Court's standard and the clear criteria laid out in *Kallas* are ignored by the Kohns, who claim:

> The relevant question is whether [the bleachers] *are movable*, which is the real test to be applied in determining whether something is a "permanent addition to or betterment of real property" so as to be deemed an improvement to real property covered by the statute. Kallas, 66 Wis. 2d at 386.

Respondent's Brief ("Resp't Br."), p. 12. The adjectives "movable" and "portable" provide a refrain for the Kohns; a refrain that follows verses full of claims, without record support, that the bleachers are "unaffixed" and "easily disassembled" and "free standing."[1] The only piece of record evidence in this case to which the Kohns may point to support their red herring mobility argument is the description, in Standard Steel's bid to sell Darlington High School the bleachers, that they are "PORTABLE ELEVATED BLEACHERS." App. 067. They are indeed portable bleachers, as distinguished from a poured form, concrete stadium; one could (although nobody ever has) disassemble the structure—bolt-by-bolt and nut-by-nut—just as one could disassemble and move an oil pipeline or sprinkler system or a Harvestore™, and reassemble them elsewhere. What the

[1] The Kohns, at various points in their brief to this Court, argue that the bleachers were *not* installed, but "merely erected," and that such a distinction somehow proves the bleachers are not an improvement to real property. *See, e.g.*, Resp't Br., p. 13. ITW does not believe this semantic game is of any consequence, but, it should be pointed out that the Kohns, in the very same brief, concede many times that the bleachers were "installed." *Id.*, pp. 3 (twice), 4, and 7 (twice). Their Amended Complaint also alleges the bleachers were both "installed" and "constructed." *See* App. 021, ¶ 10; App. 023-024, ¶¶ 20, 25, 28.

Court of Appeals and the Kohns fail to understand is that it does not matter.

"Mobility" is not the "real test"—*Kallas* does not, at any point in the opinion, support the Kohns' assertion, much less at page 386, to which the Kohns cite. Nor, of course, does *Wesley*. The notion that an improvement's *ability* to be disassembled or moved will exempt it from the statute's purview ignores this Court's clear interpretations of what an improvement to real property is, and also ignores reality: almost anything *can* be removed or disassembled. The Court of Appeals committed error in not applying this Court's clear precedent to the actual facts of this case. When one does so, there can be no question that, as a matter of law, the bleachers are an improvement to real property.

First, were they a permanent addition to or betterment of the property? Yes. They were meant to enhance, exclusively, a football field and running track, themselves unquestionably real property. As a testament to their permanency and function, the bleachers have stood static for (now) more than 35 years while, year-in-and-year-out, fans of Darlington High School football, track and field have enjoyed

them. The school's intent to make them permanent is demonstrated by both the size and weight of the structure and the undisputed fact that they were never disassembled or moved between their installation and Elaine Kohn's fall.

Did the bleachers enhance the property's capital value? No appraisal is available, but one cannot credibly argue that the presence of bleachers with seating for 1,500 spectators does not enhance the capital value of an athletic complex.

Did installing the bleachers involve the expenditure of money or labor? Yes, both. The school paid Standard Steel more than $16,000 in 1969 for the materials and supervision of the erection of the bleachers. The cost of the labor involved is not included in the record, but the bleachers did not install themselves.

Finally, were the bleachers designed to make the property more useful? Of course. A high school athletic field without provision for spectators is certainly less useful than one, like Darlington's, built to seat 1,500 people—more than

sixty percent of the town's population at the time the bleachers were installed.[2]

II. WIS. STAT. § 893.89 IS CONSTITUTIONAL UNDER THE WISCONSIN AND UNITED STATES CONSTITUTIONS.

Wisconsin Statutes § 893.89 does not violate article I, § 9 of the Wisconsin Constitution. It does only what a statute of repose, by definition, is supposed to do: protect defendants from fraudulent and stale claims and evince a legislative policy choice that there should be finality to one's exposure to liability for certain claims. No "right-to-remedy" exists here because the legislature chose not to recognize a legal right to bring a claim occurring more than ten years after completion of an improvement to real property.

Likewise, § 893.89 does not violate the equal protection clauses of the United States or Wisconsin Constitutions. The classifications drawn by § 893.89 have a rational basis, such that the Kohns are not deprived of equal protection of the law.

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[2] According to the 1970 Census, the City of Darlington's population was 2,351. *See* 1990 Census of Housing and Population Wisconsin 42, available at http://www.census.gov/prod/cen1990/cph2/cph-2-51.pdf (historical data included).

All of the Kohns' legislatively recognized claims are available to them. If the bleacher material had somehow failed (it didn't), they would have been entitled to sue its manufacturer. If a maintenance, operating or inspecting problem occurred, they are entitled to sue (and have sued) the party responsible for those duties—Darlington Community Schools. Because the Wisconsin legislature has made a rational policy decision not to recognize certain causes of action more than ten years after substantial completion of improvements to real property, and because ITW is a member of the group granted immunity, the Kohns are barred by Wis. Stat. § 893.89 from pursuing their complaint against ITW.

A. The Kohns Must Establish That § 893.89 Is Unconstitutional Beyond A Reasonable Doubt.

Before examining the merits of the Kohns' constitutional arguments, it is important to remember that they face a high burden of proof to establish that § 893.89 is unconstitutional. As both a protection for and function of the fundamental principle of separation of powers, statutes carry a heavy presumption of constitutionality, and "[t]he challenger of a statute must prove beyond a reasonable doubt

that the act is unconstitutional." *Chappy v. LIRC*, 136 Wis. 2d 172, 185, 401 N.W.2d 568 (1987). Furthermore, "[e]very presumption must be indulged to sustain the law if at all possible and, wherever doubt exists as to a legislative enactment's constitutionality, it must be resolved in favor of constitutionality." *State ex rel. Hammermill Paper Co. v. La Plante*, 58 Wis. 2d 32, 46, 205 N.W.2d 784 (1973). The Kohns have not met this tremendous burden.

B. Section 893.89 Does Not Violate Article I, § 9 Of The Wisconsin Constitution.

To understand § 893.89 and the pending constitutional questions, it is essential to examine the meaning, purpose, and intent of statutes of repose.

1. Statutes of repose bar claims even before a claim has accrued or an injury has resulted.

This Court has recognized that statutes of repose reflect legislative policy choices; specifically, the difficult choice to limit causes of action. *See Tomczak v. Bailey*, 218 Wis. 2d 245, 268, 578 N.W.2d 166 (1998) ("[A]s with any statute of repose, the legislature was faced with the difficult choice of terminating liability...."). "The legislature

formulates the statutory law of Wisconsin, pursuant to constitutional authority. The legislature's authority includes the power to define and limit causes of action and to abrogate common law on policy grounds." *Aicher v. Wisconsin Patients Compensation Fund*, 2000 WI 98, ¶ 51, 237 Wis. 2d 99, 613 N.W.2d 849.

In *Aicher* this Court concluded that statutes of repose reflect legislative policy choices to protect "the interests of those who must defend claims based on old acts or omissions," *id.*, ¶ 50, and that "prompt litigation ensures fairness to the parties." *Id.*, ¶ 53. Acknowledging potentially harsh results, this Court noted that "the time limitation periods articulated by statutes of repose inherently are policy considerations better left to the legislative branch of government," and concluded, "[w]ere we to extend a right to remedy outside the limits of [the statutes of repose], we effectively would eviscerate the ability of the legislature to enact any statute of repose." *Id.*, ¶ 54.

Statutes of repose differ fundamentally from statutes of limitations. In *Landis v. Physicians Ins. Co. of Wis., Inc.*, 2001 WI 86, 245 Wis. 2d 1, 628 N.W.2d 893, this Court aptly

explained this difference. Statutes of limitations establish "a time limit for suing in a civil case, based on the date when the claim accrued (as when the injury occurred or was discovered). The purpose of such a statute is to require diligent prosecution of known claims...." *Landis*, 2001 WI 86 ¶ 28.

In contrast, statutes of repose "bar[] a suit a fixed number of years after the defendant acts in some way (as by designing or manufacturing a product), even if this period ends before the plaintiff has suffered any injury," and begins running once "a specific event occurs, *regardless of whether a cause of action has accrued or whether any injury has resulted.*" *Id.*, ¶ 28 (emphasis added). Simply put, the clock on a statute of repose turns upon the actions of a potential defendant and is unrelated to any actions by a plaintiff.

Understanding the distinction between a statute of repose and a statute of limitation, and recognizing that the Wisconsin legislature and this Court have endorsed that difference, it is apparent that applying § 893.89 to the Kohns' claims against ITW, which accrued after the statute of repose had run, serves the legislative purpose behind § 893.89.

2. Article I, § 9 protects only existing legal rights.

Article I, § 9 has been referred to as the "access to courts clause" or the "right-to-remedy provision" and has been interpreted on several occasions. *See In re James A.O.*, 182 Wis. 2d 166, 175, 513 N.W.2d 410 (Ct. App. 1994). The resounding theme of decisions interpreting article I, § 9 is that it confers no legal rights. *Aicher*, 2000 WI 98, ¶ 43 (citing a number of decisions from this Court so holding).

Despite conceding that article I, § 9 confers no legal right, the Kohns argue that § 893.89 "patently deprives [them] of that to which [they are] entitled to under article I, § 9 of the Wisconsin Constitution." *Compare* Resp't Br., p. 34 *with* Resp't Br., p. 31. The Kohns either misunderstand or have chosen to ignore the nature of article I, § 9 and the wealth of decisions interpreting it.

This Court has stated definitively that "art. I, § 9 applies only when a prospective litigant seeks a remedy for an already existing right." *Aicher*, 2000 WI 98, ¶ 43. Article I, § 9 preserves only remedies for already "legislatively recognized right[s]," *Estate of Makos v. Wis. Masons Health Care Fund*, 211 Wis. 2d 41, 79, 564 N.W.2d 662 (1997)

(Bradley, J., dissenting) (*citing Mulder v. Acme-Cleveland Corp.*, 95 Wis. 2d 173, 189-90 n.3, 290 N.W.2d 276 (1980)), or stated another way, "the right 'to obtain justice on the basis of the law as it in fact exists.'" *Aicher*, 2000 WI 98, ¶ 43 (*quoting Mulder*, 95 Wis. 2d at 189). Moreover, legislative actions—including statutes of repose generally, and, in this case, § 893.89 specifically—define how the law in fact exists, and thus, the remedies preserved under article I, § 9. *See id.* at ¶ 44. Because § 893.89 simply defines the temporal extent of the duty of the classes of potential defendants defined in the statute, article I, § 9 has not been violated.

3. Section 893.89 reflects a sound legislative policy choice to limit the period of exposure to claims.

The Kohns claim that "[t]he constitutionality of statutes of repose, such as § 893.89, is by no means a settled issue." Resp't Br., p. 31. Not true. This Court definitively settled the constitutionality of statutes of repose vis-à-vis article I, § 9 in *Aicher,* by explicitly overruling the case that generated debate over the constitutionality of statutes of repose. 2000 WI 98, ¶¶ 32-40. Nevertheless, the Kohns ignored *Aicher* at the trial court, they ignored *Aicher* at the

court of appeals even after the trial court dismissed their article 1, § 9 claim with a citation to *Aicher*, and only now do they attempt to distinguish *Aicher*. *See* Resp't Br., pp. 32-34. Their belated attempt fails.

In *Aicher*, this Court upheld the legislative policy choice of statutes of repose in the context of medical malpractice claims. *Aicher*, 2000 WI 98, ¶ 54 (addressing Wis. Stat. §§ 893.55 and 893.56).[3]

In *Aicher*, a thirteen-year-old plaintiff brought a medical malpractice claim alleging she became blind as a result of malpractice during her newborn exam. 2000 WI 98, ¶ 9. The statutes of repose barred her claim. Focusing on the legislative policy choices involved in enacting statutes of repose, the court held that the statutes of repose did not violate article I, § 9:

> No right to remedy resides here because the legislature expressly chose not to recognize a right based on a claim discovered more than five years after the allegedly negligent act or omission or after the child reaches the age of ten. *We cannot preserve a right to obtain justice where none in fact exists.*

[3] Wis. Stat. § 893.55(1)(b) limits a medical malpractice claim to within three years of the injury or within one year of discovery, provided that five years have not passed since the act or omission; § 893.56 extends the limitation period for minors to the age of ten years, notwithstanding the five year period of repose.

Aicher, 2000 WI 98, ¶ 54 (emphasis added).

Significantly, the decision in *Aicher* did not depend upon the wisdom of the policy considerations uniquely advanced by the medical malpractice statute of repose, as alleged by the Kohns. *See* Resp't Br., pp. 32-34. Rather, this Court upheld the medical malpractice statute of repose qua statute of repose. *See Aicher*, 2000 WI 98, ¶¶ 53-54. Although §§ 893.55 and 893.56 incidentally addressed medical malpractice, the decision did not depend upon this characteristic. *See id.* Contrary to the Kohns' argument, this Court rooted the *Aicher* decision in the separation-of-powers doctrine. *See Aicher*, 2000 WI 98, ¶¶ 53-54 ("We remain persuaded that the time limitation periods articulated by statutes of repose inherently are policy considerations better left to the legislative branch of government."). In doing so, this Court affirmed the constitutionality of statutes of repose as a group, not just the specific statute of repose in question.

Like the statute at issue in *Aicher*, Wis. Stat. § 893.89 is consistent with the history and purpose of article I, § 9. In this case, § 893.89 does not deprive the Kohns of a remedy

for an already existing right.[4] A statute of repose applies and is constitutional even if a particular plaintiff's injury did not—or even could not—occur before the ten-year limit. *Aicher*, 2000 WI 98, ¶ 50. By enacting § 893.89, the legislature made the policy choice to close the courtroom doors to claims for injuries from improvements to real property—regardless of theory—ten years after the date of completion. ITW has a right to rely on this legislative decision. *See id.*, ¶ 47.

Accordingly, § 893.89 applies to the Kohns even though it "has the direct effect of extinguishing any remedy as of way back in 1979—ten years after ITW allegedly substantially completed the bleachers, *and four years before Elaine Kohn was born*." Resp't Br., p. 31.[5] The Kohns have no existing legal right to file a complaint against ITW for injury resulting from any alleged defect in the design or construction of the bleachers more than ten years after their

[4] Any existing right to pursue damages at the time § 893.89 took effect was preserved by subsection (4)(d), which states that the statute of repose "does not apply" to "[d]amages that were sustained before April 29, 1994." Wis. Stat. § 893.89(4)(d) (2003-04).

[5] In fact, Elaine Kohn was born in 1996, so any rights against a party protected by § 893.89 expired 17 years before she was born.

substantial completion because that is when the defendant's duty expired.

Allegations of unfairness in the application of § 893.89 do not render the statute unconstitutional. *Cf.* Resp't Br., p. 32. As in *Aicher*, this Court may "shudder at the unfairness visited by [§ 893.89]," but any alleged unfairness is a calculated policy choice of the legislature and does not render § 893.89 constitutionally infirm. *See Aicher*, 2000 WI 98, ¶ 45.

This Court has made itself clear on this issue: "Article I, § 9 does not empower this court to substitute its views for legislative policy...." *Aicher*, 2000 WI 98, ¶ 52. Section 893.89 is sound legislative policy. No "right-to-remedy" exists here because the legislature expressly chose not to recognize a right based on a claim occurring more than ten years after the allegedly negligent act or omission. Section 893.89, therefore, does not violate article I, § 9 of the Wisconsin Constitution.

C. Wis. Stat. § 893.89 Does Not Violate The Equal Protection Clause Because The Classifications In The Statute Are Rational And Reasonable.

A statutory classification that treats members of a similarly situated class differently and does not involve a suspect class or a fundamental interest does not violate equal protection "if there exists any rational basis to support it." *Nankin v. Shorewood*, 2001 WI 92, ¶ 11, 245 Wis. 2d 86, 630 N.W.2d 141. The Kohns fail to establish an equal protection violation for two reasons: (1) manufacturers are not similarly situated to firms like Standard Steel, which designed the bleachers and supervised their installation; and (2) even if a court were to conclude that the two are similarly situated, a rational basis exists to justify differential treatment.

"[A]n equal-protection violation is not to be found merely because some inequality results from the classification." *Funk v. Wollin Silo & Equipment, Inc.*, 148 Wis. 2d 59, 69, 435 N.W.2d 244 (1989). So long as there is a "rational and reasonable basis for different[ial] treatment," a statute will be constitutional. *Id.*

Section 893.89 satisfies the rational basis test as laid out in *Dane County v. McManus:*

> (1) All classification[s] must be based upon substantial distinctions which make one class really different from another.
>
> (2) The classification adopted must be germane to the purpose of the law.
>
> (3) The classification must not be based upon existing circumstances only.
>
> (4) To whatever class a law may apply, it must apply equally to each member thereof.
>
> (5) That the characteristics of each class should be so far different from those of other classes as to reasonably suggest at least the propriety, having regard to the public good, of substantially different legislation.

55 Wis. 2d 413, 423, 198 N.W.2d 667 (1972) (citations omitted).

The classifications in Wis. Stat. § 893.89 result in two classes of potential defendants with exposure to liability beyond the ten year exposure period: (1) manufacturers or producers of material used in the improvement to real property; and (2) owners or occupiers that are responsible for maintenance, operation or inspection of the improvement to real property. That is where the Kohns' equal protection argument is fundamentally flawed in its most important premise: the "protected" and "unprotected" groups are not "similarly situated." In fact, there are substantial distinctions

between the protected and unprotected classes that justify their differential treatment.

Initially, one need look no further than the title of the statute and its intended coverage to understand the distinction the legislature made—it covers *the improvement*, that is, the work that goes into planning, designing and completing the project. A "manufacturer or producer" of "material" is exempt from the protection afforded by § 893.89 for the same reason that subsection (4)(c) exempts owners and occupiers that maintain, operate or inspect improvements to real property—their work is, *per se*, either unchanged or ongoing. A manufacturer remains responsible for "any defect in any material used" because it *manufactured* the building material and, of course, is the only party responsible for *defects in the material*.[6] These two unprotected classes can be fairly judged on the quality of their work—maintenance or manufacturing—as it was when they "completed" it.

A manufacturer's responsibility for the integrity of the material it fabricates or produces is fundamentally different

[6] Wisconsin has no statute of repose for manufactured products, reflecting the legislative policy decision to allow causes of action to exist beyond any repose period for defective products.

from the legislature's intended coverage of the statute of repose for improvements to real property which covers the completion of the improvement, *i.e.*, the workmanship of its planners, designers and laborers.

The class protected by the statute includes all those whose involvement ends with the completion of the improvement to real property, necessarily excluding manufacturers which bear continuing responsibility for any defects in the material itself and owners or occupiers which bear responsibility for maintaining, operating or inspecting the improvement. In contrast, the protected group's work may no longer be fairly judged after ten years due to use, maintenance, the passage of time, changes in technology and changes in statutes, codes and regulations. The statute, in its current form since 1993, is tailored precisely to this purpose. It provides a policy judgment in favor of providing a sunset on potential liability for those parties whose *work* may no longer be intact and unchanged ten years down the road.

That the Kohns are utterly confused by this distinction is best evidenced by the following argument:

> The continuing irrationality and unreasonableness of the statute may be seen most clearly by comparing the

> bleachers to a dangerous attractive nuisance or any other dangerous instrumentality. If ITW had placed a defective roller coaster on the school grounds, no one would be arguing that injury caused by it was beyond legal liability. Likewise, a statute or repose would make no sense in the case of an attractive nuisance, which lured children to danger and their extreme peril.

Resp't Br., p. 24. In fact, if ITW had constructed a "defective" roller coaster on the school grounds in August of 1969, and Elaine Kohn had fallen from one of its cars on September 29, 2000, ITW would be making precisely the same argument it is today (and, no doubt, the Kohns would contest that the roller coaster is an improvement to real property because its tracks and framework would not be sufficiently "physically annexed"). Still, "the injury" would not be "beyond legal liability" under Wis. Stat. § 893.89 because the Kohns would be entitled to pursue the owner or occupier and, of course, whatever party was operating the roller coaster at the time of the accident.

The Kohns' "attractive nuisance" analogy is even more flawed. Attractive nuisance claims are specifically brought against possessors of real estate, that is, owners or occupiers—one of the very classes

not protected by Wis. Stat. § 893.89—no doubt because, as owners or occupiers, they have the ability to maintain, repair, or upgrade the improvement and/or regulate its use.[7] If, in fact, the attractive nuisance was an in-ground, concrete swimming pool constructed by ITW at a motel more than ten years before a small child wandered onto the property and fell into it, then the statute of repose would protect ITW just as it does in this case (assuming the child's parents also claimed defective design or construction, since an attractive nuisance claim could not be brought against a pool

[7] Plaintiffs claiming attractive nuisance must prove the following:

(1) ... that the former [possessor of real estate] maintained, or allowed to exist, upon his land, an artificial condition which was inherently dangerous to children being upon his premises....
(2) ... that he knew or should have known that children trespassed or were likely to trespass upon his premises....
(3) ... that he realized or should have realized that the structure erected or the artificial condition maintained by him was inherently dangerous to children and involved an unreasonable risk of serious bodily injury or death to them....
(4) ... that the injured child, because of his youth or tender age, did not discover the condition or realize the risk involved in going within the area, or playing in close proximity to the inherently dangerous condition....
(5) ... that safeguards could reasonably have been provided which would have obviated the inherent danger without materially interfering with the purpose for which the artificial condition was maintained....

Christians v. Homestake Enters., Ltd., 101 Wis. 2d 25, 44, 303 N.W.2d 608 (1981) (citation omitted).

installer unless the party was also the owner or occupier of the land).

The Kohns continue, as they did in the trial court and Court of Appeals, to rely heavily on this Court's holding in *Kallas* that a predecessor statute was unconstitutional. In *Kallas*, this Court held that § 893.155[8] violated the equal protection clauses of the United States and Wisconsin Constitutions because of the unreasonable legislative classification giving special protection to persons "performing or furnishing the design, planning, supervision of construction or construction" of an improvement to real property, while providing no protection to other classes such

[8] Section 893.155 was the predecessor to § 893.89. It stated, in pertinent part:

> 893.155 Within 6 years. No action to recover damages for any injury to property, or for an injury to the person, or for bodily injury or wrongful death, arising out of the defective and unsafe condition of an improvement to real property, nor any action for contribution or indemnity for damages sustained on account of such injury, shall be brought against any person performing or furnishing the design, planning, supervision of construction or construction of such improvement to real property, more than 6 years after the performance or furnishing of such services and construction. This limitation shall not apply to any person in actual possession and control as owner, tenant or otherwise, of the improvement at the time the defective and unsafe condition of such improvement constitutes the proximate cause of the injury for which it is proposed to bring an action.

as materialmen (ignored by § 893.155) and owners and occupants who were specifically excepted from its coverage.

A later constitutional challenge (again based on the under-inclusive nature of the statute) was successful in *Funk*. This result, however, was hardly surprising. Indeed, one commentator predicted it as early as 1979. *See* Patricia D. Jursik, *Defective Design—Wisconsin's Limitation of Action Statute for Architects, Contractors and Others Involved in Design and Improvement to Real Property*, 63 Marq. L. Rev. 87, 101-03(1979) (observing that the 1979 amendment merely transformed an explicit exemption for owners and occupiers into an implicit exemption).

Since *Funk*, the legislature addressed this Court's concerns over the exclusion of particular owners and occupiers from the statute with the 1993 amendment. The amended statute makes it clear that owners and occupiers who engage in active negligent "maintenance, operation or inspection of an improvement to real property" are excluded. By making it clear that active, ongoing negligence is not excluded from liability, the legislature has supplied a rational basis for distinguishing between classes. Accordingly, since

then, the statute has survived in its current form—a form which has very explicit and rational classifications for those protected by the statute of repose and those not protected by it.

The Kohns' claim that the effect of the post *Funk* amendments is to "shift[] liability," and that, as a result, the statute is "irrational" is really nothing more than a thinly-disguised attack on its wisdom. *See* Resp't Br., p. 30. And, whether the distinction drawn by Wis. Stat. § 893.89 is wise and whether the distinction results in inequality are not bases for finding an equal protection violation. *See State v. Cole*, 2003 WI 112, ¶ 18, 264 Wis. 2d 520, 665 N.W.2d 328 ("We as a court are not concerned with the merits of the legislation under attack. We are not concerned with the wisdom of what the legislature has done."); *Funk*, 148 Wis. 2d at 69 ("[A]n equal-protection violation is not to be found merely because some inequality results from the classification."). Indeed:

> If there is any reasonable basis upon which the legislation may constitutionally rest, the court must assume that the legislature had such fact in mind and passed the act pursuant thereto. The court cannot try the legislature and reverse its decision as to the facts. All facts necessary to sustain the act must be taken as conclusively found by the legislature, if any such facts may be reasonably conceived in the mind of the court.

GTE Sprint Communications Corp. v. Wis. Bell, Inc., 155 Wis. 2d 184, 192, 454 N.W.2d 797 (1990).

Just as the Kohns' "right-to-remedy" challenge fails to meet the stringent burden of proof—beyond a reasonable doubt—their equal protection argument also fails.

CONCLUSION

The bleachers at the Darlington High School football field, when analyzed under this Court's clear precedent, are, as a matter of law, an improvement to real property under Wis. Stat. § 893.89, notwithstanding the Kohns' desperate argument to the contrary, made only after the trial court dismissed their claims against ITW.

The Kohns' claim that Wis. Stat. § 893.89 is unconstitutional also fails. The Kohns have not met their burden to demonstrate, beyond a reasonable doubt, that § 893.89 violates article I, § 9 of the Wisconsin Constitution or the equal protection clauses of the Wisconsin or United States Constitutions.

The decision of the Court of Appeals' should be reversed.

Dated: March 1, 2005.

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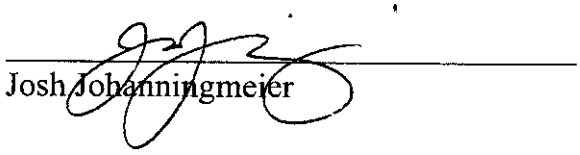
CERTIFICATION

I hereby certify that this brief conforms to the requirements of Wis. Stat. §§ 809.19(8)(b) and (c), and this Court's February 9, 2005 Order for a brief produced with a proportional font. The length of this brief is 5,463 words.

Dated: March 1, 2005.



Josh Johanningmeier

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STATE OF WISCONSIN SUPREME COURT

ELAINE MARIE KOHN,
RONNIE A. KOHN, and
LORI K. KOHN,

Plaintiffs-Appellants,

PHYSICIANS PLUS INSURANCE CORPORATION,

Plaintiff,

v. Appeal No. 03-1067

DARLINGTON COMMUNITY SCHOOLS,
EMC INSURANCE COMPANY,
STANDARD STEEL INDUSTRIES, INC., and
METALIST INDUSTRIES, INC.,

Defendants,

ILLINOIS TOOL WORKS INC.,

Defendant-Respondent-Petitioner.

NON-PARTY BRIEF OF THE WISCONSIN INSURANCE ALLIANCE

Appeal from Decision of the Lafayette County Circuit Court,
Hon. Daniel L. LaRocque, Presiding
Case No. 01-CV-48

WISCONSIN INSURANCE ALLIANCE
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INTRODUCTION

The Wisconsin Insurance Alliance (the "WIA"), by its attorney, Eric Englund, submits the following as its non-party brief in this appeal.

The WIA has taken part as *amicus curiae* in numerous appeals before this Court. *See, e.g., Wischer, et al. v. Mitsubishi Industries America, Inc., et al.*, Nos. 01-0724, 01-1031, 01-2486 (decision pending); *Peace v. Northwestern National Insurance Co.*, 228 Wis. 2d 106, 596 N.W.2d 429 (1999). Most of those cases have involved questions unique to insurance companies. This one does not. And in many of those cases, the WIA has joined the parties in arguing about relatively fine points concerning contract and statutory interpretation. In this case, to the contrary, the WIA has chosen to avoid the trees and focus on the forest.

When interpreting the phrase "improvement to real property," the Court of Appeals has ignored the Wisconsin Legislature's express language. More significantly, it has ignored common sense. If the football grandstand at issue in this case is not an "improvement to real property," as the Court of Appeals has held, then what is?

The Legislature has determined that individuals and companies who build permanent structures on real property – and who have no further involvement with those structures – should have some comfort that if their work holds up for at least ten years, they will not be liable for problems after that. That rule makes perfect sense, and this Court should enforce it here.

BACKGROUND

In 1969, Standard Steel Industries, Inc. ("Standard Steel") supplied the materials and supervised the installation of aluminum bleachers at the Darlington High School football field. R. 41, p. 2; R. 42, pp. 6, 32. Photographs provided to the courts in this case support Illinois Tool Works' ("ITW") contention that the bleachers are bolted in place. R. 42, pp. 27-40. The home team bleachers, which are at issue in this case, are more than 100 feet long, with 15 rows of seats. R. 42, Ex. B. The Darlington Community School District (the "District") has never moved or taken apart the bleachers. R. 42, pp. 51-53. And Standard Steel and its successors (including ITW) have never performed any maintenance on the bleachers. R. 42, pp. 51-52. On September 29, 2000, 31 years after the bleachers were installed, four-year-old Elaine Marie Kohn fell through the bleachers at a Darlington High School football game, sustaining significant injuries.

ARGUMENT

This case involves a tragic accident – one that hits particularly close to home for any parent. But justice is, in fact, blind, and the severity of the injuries and the age of the victim should have no bearing on the defendants' liability.

If the District acted negligently or if it violated the Safe Place Statute or otherwise violated Elaine Marie Kohn's rights, then the plaintiffs will be entitled to recover damages in this case. But those damages should not come from ITW (as Standard Steel's successor).

Standard Steel supplied the materials and supervised the installation of the bleachers 31 years before the accident. The Company had no further contact with the bleachers. And the bleachers remained in place – a permanent structure – for the entire 31 years.

Like a house or a garage, the bleachers were an "improvement to real property." The Wisconsin Legislature has decided that there should be some point in time at which the individuals and companies "involved in the improvement to real property" no longer have to worry about being sued for their work. In particular, the Legislature chose to codify a ten-year statute of repose.

> (1) In this section, "exposure period" means the ten years immediately following the date of substantial completion of the improvement to real property.
>
> (2) Except as provided in sub. (3), no cause of action may accrue and no action may be commenced, including an action for contribution or indemnity, against the owner or occupier of the property or against any person involved in the improvement to real property after the end of the exposure period ....

Sec. 893.89, Stats.

That rule makes perfect sense. There must be some stopping point. If a brick falls off of a 100-year-old house and hits somebody on the head, the builder or its successors in interest should not be dragged into court and held responsible. In fact, if it took 100 years until the first brick fell off of the house, the builder should be lauded. And so should it be in this case. Standard Steel played a significant role in the construction of a large set of bleachers that has withstood the test of time. ITW, Standard Steel's successor, should not face a trial and a

possible judgment based on an accident that took place 31 years after the bleachers were installed.

But this rule does not apply to all products. If your 11-year-old car suddenly bursts into flame based on a latent design defect, section 893.89, Stats., would not prevent a lawsuit against the manufacturer of the car. Rather, this statute of repose applies only to "improvement[s] to real property." Sec. 893.89, Stats.

What is an "improvement to real property"? This Court has defined the term as follows: a permanent addition to or betterment of property that enhances the property's value, involves the expenditure of money or labor, and has been designed to make the property more useful. *Kallas Millwork Corp. v. Square D Co.*, 66 Wis. 2d 382, 225 N.W.2d 454 (1975). Certainly a house fits the definition. And the Darlington High School building does. This Court also has held that a high-pressure water system designed for fire protection, *Kallas*, 66 Wis. 2d 382, and an underground oil pipeline, *U.S. Fire Insurance Co. v. E.D. Wesley Co.*, 105 Wis. 2d 305, 313 N.W.2d 833 (1982), both were "improvement[s] to real property." So why not the football grandstands in this case?

The Standard Steel bleachers at issue here are as big or bigger than most houses – certainly, they are much larger than the items at issue in *Kallas* and *Wesley*. Their permanency can hardly be questioned; they were not moved one inch nor taken apart in over 30 years. And they were secured in place like other

obvious "improvement[s] to real property." Common sense dictates that these 100-foot-long, 15-row-high bleachers satisfy the statutory definition.[1] If they do not, then what does?

Manufacturers, installers, and builders of significant, permanent structures – "improvement[s] to real property" – should have comfort that, if their work lasts more than ten years, they will not be dragged into court decades later based on an accident over which they had no control.

Not only does the statute of repose in section 893.89, Stats., provide needed finality and certainty for insurers and their insureds, but it also prevents nearly insurmountable problems with evidence. How can a plaintiff conclusively prove that an accident was caused by faulty design, manufacture, or installation of a permanent structure on property, as opposed to normal wear and tear, acts of nature, improper maintenance and repairs, or some other conduct by a third party? Witnesses have died or moved away, evidence has been destroyed or lost, memories have faded, and the list of evidentiary problems goes on and on. This Court can provide certainty and avoid those evidentiary problems by using common sense when interpreting the phrase "improvement to real property" in section 893.89, Stats.

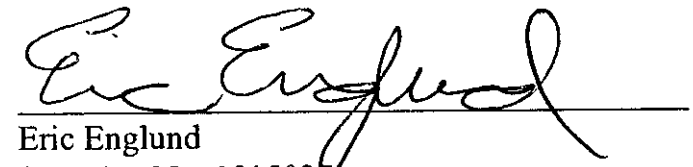
---

[1] Other courts have held that a set of bleachers constitutes an "improvement to real property." *See, e.g., Florence County School District No. 2 v. Interkal Inc.*, 559 S.E.2d 866 (S.C. Ct. App. 2002); *McDonough v. Marr Scaffolding Co.*, 591 N.E.2d 1079 (Mass. 1992).

The WIA asks the Court to do just that and to reverse the Court of Appeals' decision.

Dated this 25 day of January, 2005.

WISCONSIN INSURANCE ALLIANCE

By: 

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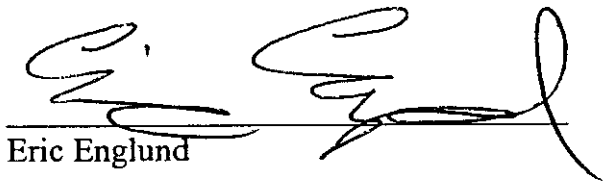
CERTIFICATION

I hereby certify that this brief conforms to the rules contained in section 809.19(8)(b) and (c), Stats., for an amicus brief produced with a proportional font. The length of this brief is 1,226 words.

Dated: January 25, 2005.



Eric Englund